CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 19, 113, and 144

(T.D. 97–19)

RIN 1515–AB86

DUTY-FREE STORES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations principally with respect to duty-free stores in order to reduce the overall paperwork burden for proprietors thereof as well as for Customs. In particular, for purposes of Customs audit of, and control over, such facilities, greater reliance is placed on the use of records generated and maintained by proprietors and importers in the ordinary course of business, instead of on the use of specially prepared Customs forms. The amendments provide benefits in this regard to other classes of Customs bonded warehouses as well.

EFFECTIVE DATE: May 5, 1997.

FOR FURTHER INFORMATION CONTACT: Steven T. Soggin, Program Officer, Office of Field Operations, (202–927–0765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

By a final rule document published in the Federal Register as T.D. 92–81 on August 20, 1992 (57 FR 37692), the Customs Regulations were amended to designate duty-free stores as a new class of Customs bonded warehouse, and to incorporate operating procedures for the administration of these facilities.

However, in letters dated October 6 and 13, 1992, a major trade association voiced a number of concerns with respect to the final rule. Prompted by this correspondence, and following lengthy study, Customs published a notice of proposed rulemaking in the Federal Register on June 6, 1996, 61 FR 28808, setting forth specific revisions to the

duty-free store regulations. The proposed changes also provided some benefits to other classes of bonded warehouses, and were intended to reduce the overall paperwork burden both for warehouse proprietors and for Customs.

In brief, under the proposed rule, the following sections of the Customs Regulations were to be affected: §§ 19.1, 19.2, 19.4, 19.6, 19.11, 19.12, 19.35, 19.36, 19.37, 19.39, 113.63, 144.34, 144.36, 144.37, 144.39 and 144.41.

Seven commenters responded to the notice of proposed rulemaking. A description, together with Customs analysis, of the comments they made is set forth below.

DISCUSSION OF COMMENTS (PART 19)

Comment:

Two commenters stated that the term "exclusively" in proposed § 19.1(a)(9) limits the operation of a warehouse to that of a duty-free store providing only conditionally duty-free merchandise to another duty-free store. It was requested that proposed § 19.1(a)(9) be amended by deleting "exclusively" to allow continued operations of multi-class warehouses.

Customs Response:

The wording of § 19.1(a)(9) is correct. Section 19.1(a)(9) states: "All distribution warehouses used exclusively to provide individual duty-free sales locations and storage cribs with conditionally duty-free merchandise are also Class 9 warehouses." While the term "exclusively" in this context defines a warehouse solely distributing merchandise to a duty-free store as a Class 9 warehouse, this does not preclude a multi-class warehouse which distributes merchandise to duty-free stores from also conducting other functions of a different class for which it is approved.

Comment:

One commenter suggested amending proposed § 19.2(a) to make specific provision for facilitating the approval of a common inventory and recordkeeping system in use at multiple storage locations. The commenter stated in this regard that Customs was required to approve a proprietor's inventory and recordkeeping system in every location, even though it might be the same system, which was redundant.

Customs Response:

Customs believes that the commenter's concern is already addressed in § 144.34(c)(2), and that this matter need not specifically be addressed as well in § 19.2(a). Section 144.34(c)(2) allows a proprietor to file a single application with the director of the port in which the applicant's centralized inventory control system is located, with copies to all affected port directors. This procedure eliminates duplicative work for both Customs and the trade by initiating the Customs approval process solely at the port where the applicant's centralized inventory control system exists.

Comment:

One commenter objected to the proposed elimination from § 19.2(g) of the cross-reference therein to § 19.3(f), which, as such, provided for an administrative hearing in the case of a decision by a port director to deny an initial application for a bonded warehouse. This commenter stated that eliminating a hearing, though rarely needed, would increase the chance of costly and time-consuming litigation.

Customs Response:

Customs disagrees, to the extent that the citation in § 19.2(g) to § 19.3(f) does arguably accord the right to an administrative hearing as well in the case of the denial of an application to bond a warehouse. Formal administrative hearings are themselves costly to the Government, often requiring the services of an administrative law judge. Customs believes that administrative resources for such a hearing are best limited to those instances involving the revocation or suspension of bonded warehouse status, as expressly provided for under § 19.3(f).

Comment:

One commenter recommended that proposed § 19.4(b)(5) reducing the storage time from 5 years to 6 months for original duty-free sales tickets be amended to eliminate all time requirements for retention of original duty-free sales tickets.

Customs Response:

Customs disagrees. The record retention period of 6 months is already a marked time reduction from the current sales ticket storage requirement of 5 years. Customs believes a 6-month time period for storage of original duty-free sales tickets is the minimum time necessary for both the trade and Customs to verify the accuracy of original sales ticket information with sales information generated by electronic or other approved alternative means.

Comment:

One commenter suggested that proposed § 19.4(b)(7) delete the requirement to establish and maintain aisles in bonded warehouses. The commenter stated that space was a precious commodity, and proposed an alternative, whereby Customs would give a proprietor a reasonable time to produce merchandise subject to a spot check or audit.

Customs Response:

Customs agrees. The second sentence of § 19.4(b)(7) is changed to read as follows: "Doors and entrances shall be left unblocked for access by Customs officers and warehouse proprietor personnel." Also, to this end, § 19.4(b)(2) is changed to read as follows: "The warehouse proprietor shall permit access to the warehouse and present merchandise within a reasonable time after request by any Customs officer."

Comment:

One commenter asked that the last sentence of § 19.4(b)(8)(ii) be amended to include the term "unique identifier", so that it would read

as follows: "The proprietor must provide, upon request by a Customs officer, a record balance of goods, specifying the quantity in each storage location, covered by any warehouse entry, general order, seizure, or unique identifier so a physical count can be made to verify the accuracy of the record balance."

Customs Response:

Customs agrees, and the section is so changed.

Comment:

One commenter stated that proposed § 19.4(b)(9) should be amended to delete the word "destruction", because miscellaneous requirements for destruction pertain only to a few classes of warehouses. The commenter further observed that, should general order merchandise remain in a warehouse beyond 6 months, responsibility should not rest with the warehouse to maintain destruction records.

Customs Response:

Customs disagrees. The term "destruction" needs to remain in this section. An owner of merchandise in any warehouse may, at any time, lawfully request that merchandise be destroyed under Customs supervision. Requests for the destruction of merchandise in a warehouse must be accounted for by the warehouse proprietor.

Comment:

Two commenters requested that proposed § 19.6(a)(1) granting a 5-day time limit within which to file a copy of any joint discrepancy report with the port director, be amended so as to allow warehouse proprietors a 30-day limit in which to do so. The commenters thought that this increased time extension would ease a restrictive time burden by allowing a month to prepare a discrepancy report for Customs.

Customs Response:

Customs believes that the 5-day time requirement for filing a joint discrepancy report is not unduly burdensome. Indeed, this 5-day time limit itself represents a reasonable extension from the previous requirement in the Customs Regulations that such discrepancy reports be filed within 2 days. However, a 30-day time limit within which to submit these reports is too long. A joint discrepancy report involves sensitive custody transfers, and Customs believes the reasonably prompt reporting of discrepancies in this regard is essential.

Comment:

One commenter called for the deletion of the requirement for a procedures manual in proposed § 19.12(b), on the basis that the preparation and maintenance of such a manual constituted an unjustified paperwork burden.

Customs Response:

Customs disagrees. The proprietor's certification at the time of application to bond that a procedures manual describing the warehouse's

inventory and recordkeeping system meets the requirements of 19 CFR 19.12 plays a significant role in the license approval process. The importance of this requirement extends into the areas of compliance and audit activities. The manual serves as a critical tool to Customs by demonstrating the proprietor has established a methodology for inventory control and recordkeeping.

Comment:

One commenter observed that proposed § 19.12(d)(2)(ii) would in effect require a warehouse proprietor to maintain as part of an inventory recordkeeping system the cost or value of general order merchandise, and that a proprietor would often have no idea as to the cost or value of such merchandise.

Customs Response:

Customs agrees. Section 19.12(d)(2)(ii) is changed by adding at the beginning thereof the phrase, "Except for merchandise in general order,".

Comment:

Two commenters recommended that Customs amend proposed § 19.12(d)(3) to allow the option of accelerated payment of revenue for non-extraordinary shortages prior to the filing of the annual CF 300 or certification of annual reconciliation.

Customs Response:

Customs agrees. The last sentence of § 19.12(d)(3) is changed to allow a proprietor the option of submitting payment of duties and fees for non-extraordinary shortages any time prior to the annual filing of the CF 300 or certified annual reconciliation.

Comment:

One commenter advocated, with respect to proposed § 19.12(d)(5), that there be no physical inventory requirement to account for merchandise, because non-government bonded warehouses did not have such a requirement. One commenter asserted that an annual reconciliation required in proposed § 19.12(h) need not be undertaken at the same time as the physical inventory.

Customs Response:

The physical inventory requirement in § 19.12(d)(5) requires that a proprietor conduct at least one physical inventory during the year. This need not necessarily take place at the time of the annual reconciliation. Customs believes that an annual physical inventory is necessary to gauge the accuracy of the proprietor's inventory control system. Section 19.12(h) does not itself deal with the requirement for a physical inventory.

Comment:

One commenter stated that proposed § 19.12(f)(3) prohibited the application of First-In-First-Out (FIFO) procedures to various types of

merchandise, including quota and restricted merchandise. Specifically, the commenter declared that Headquarters Ruling 225837 exempted textile quota requirements on merchandise for export; therefore, no basis existed to prohibit use of FIFO procedures to such merchandise subject to textile quotas.

Customs Response:

Customs agrees, to the extent that such merchandise is for export only. To this end, accordingly, the following sentence is added to § 19.12(f)(2): "Fungible textile and textile products which are withdrawn from a Class 9 warehouse may be accounted for using FIFO inventory procedures, inasmuch as such articles would be exempt from textile quotas." In this regard, a Class 9 warehouse (duty-free store) may only sell and deliver merchandise for export to individuals departing the Customs territory.

The Committee for the Implementation of Textile Agreements (CITA), U.S. Department of Commerce, has been consulted and agrees with Customs treatment of textiles in Class 9 bonded warehouses or duty-free stores as not being subject to quota and visa requirements.

However, it is understood that any textile articles exported from a Class 9 warehouse and thereafter reimported into the U.S. would be subject to the laws and regulations of the U.S. affecting imported merchandise, including any applicable quotas.

Comment:

One commenter suggested that Customs amend proposed § 19.12(h)(2) to allow a proprietor to reconcile merchandise under an item's unique identifier number for annual reconciliation, instead of tracking by entry number. The commenter explained that it was not possible to comply with the proposed section under the FIFO inventory because units transferred to warehouses in other ports could not be posted or identified to an entry until disposed of.

Customs Response:

All merchandise accounted for as sold, damaged, short, or otherwise disposed of, receive a designated entry number. For annual reconciliation of FIFO eligible merchandise not disposed of, a list of all open and closed warehouse entries shall be presented to Customs to account for merchandise.

Comment:

One commenter requested that the address requirement be eliminated from proposed §§ 19.39(c)(5)(i) and 144.37(h)(2)(v) for Class 9 warehouses at airports. The commenter noted in this connection that few duty-free stores routinely obtained the address of a purchaser and that the address requirement had little utility in the context of airport duty-free store operations.

Customs Response:

Customs agrees with this request. The risk of diversion of goods purchased at an airport duty-free store is minimal. Hence, §§ 19.39(c)(5)(i) and 144.37(h)(2)(v) are changed to eliminate any requirement that an airport duty-free store submit to Customs upon request the address of a purchaser.

WAREHOUSE WITHDRAWALS AND REWAREHOUSE ENTRIES

Comment:

One commenter asked that proposed § 144.34(c) be amended to permit all classes of warehouses to participate in alternative transfer procedures as opposed to only Class 2 and Class 9 warehouses. The commenter stated that as long as the warehouse is owned by the same legal entity maintaining a centralized inventory control system, and has the consent of the surety, such transfer operations could easily be controlled in the same manner as those for Class 2 and Class 9 warehouses.

Customs Response:

Various custody transfer and liability issues are primary concerns preventing the extension of transfer procedures under § 144.34(c) to other classes of Customs bonded warehouses.

Comment:

One commenter suggested that Customs delete the requirements in paragraphs (c)(4)(iv) and (c)(4)(vi) of proposed § 144.34, respectively, that a warehouse proprietor operating multiple storage locations under a centralized inventory system document all intracompany transfers of merchandise by means of the appropriate warehouse entry number, as well as maintain a subordinate permit file folder at all intracompany locations where merchandise is transferred. The commenter stated that under FIFO inventory procedures, units cannot be assigned an entry number, there being no withdrawal or rewarehouse entry made at the time of transfer to place in the subordinate permit file.

Customs Response:

Customs disagrees. Customs does not require an assigned entry number at the time of transfer. Section 144.34(c)(4)(vi) allows up to 7 days to provide required warehouse entry documentation after transfer. Maintaining records in a subordinate permit file allows a proprietor to account for transactions such as shortages, overages, damages, and the like, resulting from intracompany movements. The documents required are set forth in § 19.12(d)(4).

Comment:

Two commenters observed that proposed §§ 144.34(c)(6)(ii), 144.36(c)(2), and 144.41(c)(2) appeared to suggest that "restricted" merchandise could not be included in the alternative inventory control system. The commenters believed that it was not intended to exclude alcoholic products from this privilege.

Customs Response:

The commenters are correct that alcohol and tobacco products may be included as part of an approved alternative inventory control and transfer system. To make this clear, §§ 144.34(c)(6)(ii), 144.36(c)(2) and 144.41(c)(2) are revised to state: "With the exception of alcohol and tobacco products * * *".

Comment:

One commenter recommended that proposed § 144.34(c) include transfers of merchandise from a foreign trade zone to a Class 9 warehouse.

Customs Response:

Customs has such a proposal under active consideration. Such proposal will be a subject of a separate publication, if Customs decides to proceed therewith.

CONCLUSION

In view of the foregoing, and following careful consideration of the comments received and further review of the matter, Customs has concluded that the proposed amendments with the modifications discussed above should be adopted.

In addition, § 19.35(e)(2) is changed to reflect current statutory law (19 U.S.C. 1555(b), as amended by §§ 3(a)(8) and 29, Pub. L. 104–295), which permits merchandise purchased in a duty-free store, if thereafter returned to the United States, to be subject to the personal exemption of the arriving party under either item 9804.00.65, 9804.00.70 or 9804.00.72, Harmonized Tariff Schedule of the United States.

Also, § 19.12(d)(3) is changed to provide that the amount of duty, taxes, and any interest applicable to each warehouse entry involved in multiple shortages detected in a warehouse must be separately specified, even though such duty and taxes may have been tendered in one consolidated payment. This provision is needed because such duty may be claimed for drawback, and Customs must have this information in order to process the claim.

Furthermore, for the sake of editorial clarity, the last two sentences of § 19.12(d)(5) are moved to § 19.12(d)(3), and a cross reference to § 19.4(b)(8)(ii) is added thereto, in order to properly reflect the fact that the terms "unique identifier" and "inventory category" are interrelated. Also, for editorial clarity and consistency, the term "specific identifier, wherever it appeared in the document, is changed to "unique identifier".

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

This final rule document is intended to simplify recordkeeping requirements for duty-free stores and other Customs bonded warehouses. To this end, greater reliance is placed on the use of records generated and maintained by proprietors and importers in the ordinary course of business, instead of on the use of specially prepared Customs forms. As

such, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that this rule does not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 or 604. Nor does the rule result in a "significant regulatory action" under E.O. 12866.

PAPERWORK REDUCTION ACT

The collection of information in this final rule document is contained in §§ 19.2, 19.4, 19.6, 19.11, 19.12, 19.36, 19.37, 19.39, 144.36, 144.37 and 144.41. This information is required and will be used to ensure the exportation of merchandise from duty-free stores and other Customs bonded warehouses, and to otherwise satisfy the requirements of law and the protection of the revenue. The rule is intended to simplify recordkeeping requirements for duty-free stores and other Customs bonded warehouses. The likely respondents and/or recordkeepers are business or other for-profit institutions.

The collection of information contained in this final rule document has already been approved by the Office of Management and Budget (OMB) under 1515–0005. The estimated average annual burden associated with this collection is 10 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer of the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 19

Customs duties and inspection, Imports, Exports, Warehouses.

19 CFR Part 113

Customs bonds.

19 CFR Part 144

Customs duties and inspection, Imports, Warehouses.

AMENDMENTS TO THE REGULATIONS

Parts 19, 113 and 144, Customs Regulations (19 CFR parts 19, 113 and 144) are amended as set forth below.

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for part 19 and the specific authority for §§ 19.1, 19.6, 19.11, and 19.35–19.39 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624;

Section 19.1 also issued under 19 U.S.C. 1311, 1312, 1555, 1556, 1557, 1560, 1561, 1562;

Section 19.6 also issued under 19 U.S.C. 1555;

* * * * * * *

Section 19.11 also issued under 19 U.S.C. 1556, 1562;

* * * * * * *

Sections 19.35–19.39 also issued under 19 U.S.C. 1555;

* * * * * * *

2. Section 19.1 is amended by adding a sentence at the end of paragraph (a)(9) to read as set forth below, and by removing paragraph (c).

§ 19.1 Classes of customs warehouses.

(a) * * *

(9) * * * All distribution warehouses used exclusively to provide individual duty-free sales locations and storage cribs with conditionally duty-free merchandise are also Class 9 warehouses.

* * * * * * *

3. Section 19.2 is amended by revising its heading, by adding three sentences at the end of paragraph (a), and by revising paragraphs (b)(2) and (g), to read as follows:

§ 19.2 Applications to bond.

(a) * * * The applicant must prepare and have available at the warehouse a procedures manual describing the inventory control and recordkeeping system that will be used in the warehouse. A certification by the proprietor that the inventory control and recordkeeping system meets the requirements of § 19.12 will be submitted with the application. The physical security of the facility must meet the approval of the port director.

(b) * * *

(2) A description of the store's procedures, which includes inventory control, recordkeeping, and delivery methods. These procedures must be set forth in the proprietor's procedures manual. Such manual and subsequent changes therein must be furnished to the port director upon request. The procedures in the manual shall provide reasonable assurance that conditionally duty-free merchandise sold therein will be exported;

* * * * * * *

(g) The port director shall promptly notify the applicant in writing of his decision to approve or deny the application to bond the warehouse. If the application is denied the notification shall state the grounds for denial. The decision of the port director will be the final Customs administrative determination in the matter.

4. Section 19.4 is revised to read as follows:

§ 19.4 Customs and proprietor responsibility and supervision over warehouses.

(a) *Customs supervision.* The character and extent of Customs supervision to be exercised in connection with any warehouse facility or transaction provided for in this part shall be in accordance with § 161.1 of this chapter. Independent of any need to appraise or classify merchandise, the port director may authorize a Customs officer to supervise any transaction or procedure at the bonded warehouse facility. Such supervision may be performed through periodic audits of the warehouse proprietor's records, quantity counts of goods in warehouse inventories, spot checks of selected warehouse transactions or procedures or reviews of conditions of recordkeeping, storage, security, or safety in a warehouse facility.

(b) *Proprietor responsibility and supervision.*

(1) *Supervision.* The proprietor shall supervise all transportation, receipts, deliveries, sampling, recordkeeping, repacking, manipulation, destruction, physical and procedural security, conditions of storage, and safety in the warehouse as required by law and regulations. Supervision by the proprietor shall be that which a prudent manager of a storage and manipulation facility would be expected to exercise.

(2) *Customs access.* The warehouse proprietor shall permit access to the warehouse and present merchandise within a reasonable time after request by any Customs officer.

(3) *Safekeeping of merchandise and records.* The proprietor is responsible for safekeeping of merchandise and records concerning merchandise entered in Customs bonded warehouses. The proprietor or his employees shall safeguard and shall not disclose proprietary information contained in or on related documents to anyone other than the importer, importer's transferee, or owner of the merchandise to whom the document relates or their authorized agent.

(4) *Records maintenance.* (i) *Maintenance.* The proprietor shall:

(A) Maintain the inventory control and recordkeeping system in accordance with the provisions of § 19.12 of this part;

(B) Retain all records required in this part and defined in § 162.1(a) of this chapter, pertaining to bonded merchandise for 5 years after the date of the final withdrawal under the entry; and

(C) Protect proprietary information in its custody from unauthorized disclosure.

(ii) *Availability.* Records shall be readily available for Customs review at the warehouse. In addition, a proprietor may keep records at another location for Customs review, but only if the proprietor first receives written approval for such storage from the port director.

(5) *Record retention in lieu of originals.* A warehouse proprietor may utilize alternative storage methods in lieu of maintaining records in their original formats, if such storage is approved by Customs under paragraph (b)(5)(i) of this section. For Customs purposes, original records may be stored in alternate form at any time after the final with-

drawal under the entry number to which these records pertain, except that duty-free store operators may store original sales tickets in alternate form at any time beginning six months after date of sale. If the proprietor chooses to use alternative storage methods, the following conditions must be met:

(i) *Approval*. The proprietor may request approval to maintain records in an alternative format by writing and describing the system of storage, the conversion techniques used and the security safeguards to be employed to prevent alteration, to the director of the regulatory audit field office closest to the party's headquarters operation. If satisfied that the alternative storage proposed will ensure the accuracy and availability of the records when required, the director will grant written approval.

(ii) *Retention of reproductions*. The proprietor shall retain and keep available an original and one duplicate of each microfilm, microfiche, cd ROM (compact disk, Read-Only Memory), or other storage medium used, for five years from the date of the final withdrawal under the entry number to which these records pertain. Duty-free store operators must keep alternate storage media containing sales tickets for five years from the date of the final withdrawal or five years from the date of the sale, whichever is shorter.

(iii) *Hard-copy reproductions*. The proprietor must have the capability of making direct hard-copy reproductions of the data stored on the microfilm, microfiche, cd ROM, or other storage medium. The proprietor shall bear the expense of making hard-copy reproductions of any or all records required by any proper official of the U.S. Customs Service for the audit or inspection of books and records.

(iv) *Standards required for reproducing records*. Proprietors shall maintain the integrity of the original records by insuring that copies are true reproductions of the original records and serve the purpose for which such records were created. The following shall be observed: copies shall contain all significant record detail shown on the original; copies of the record shall be so arranged, identified, and indexed that any individual document or component of the records can be located with reasonable facility; any indexes, registers, or other finding aids shall be contained on the storage medium at the beginning of the records to which they relate; each time reproductions are made, a written certification will be executed by a responsible company official (see § 191.6(a) of this chapter; the same parties who have authority to sign drawback documents are "responsible company officials" for purposes of this section), stating that the reproductions stored on the microfilm, microfiche, cd ROM, or other storage medium constitute a true, complete and accurate reproduction of the original documents; and the proprietor shall maintain and make available a manual describing procedures for reproducing original records on alternative storage media and controls in effect for assuring completeness and accuracy of the reproductions. The procedures shall incorporate reasonable controls for assuring ac-

curacy and completeness of alternative records. The proprietor is responsible for assuring that these controls are executed each time original records are reproduced.

(v) *Revocation of alternative record storage method.* Failure to maintain the records in accordance with these conditions and requirements will constitute a breach of the proprietor's bond and may result in the revocation by Customs of the privilege of maintaining records in a form other than original format.

(6) *Warehouse and merchandise security.* The warehouse proprietor shall maintain the warehouse facility in a safe and sanitary condition and establish procedures adequate to ensure the security of all merchandise under Customs custody stored in the facility. The warehouse construction will be a factor that will be considered by the port director in deciding whether to approve the application. The facility shall be built in such a manner as to render it impossible for unauthorized personnel to enter the premises without such violence as to make the entry easy to detect. If a portion of the facility is to be used for the storage of non-bonded merchandise, the port director shall designate the means for effective separation of the bonded and non-bonded merchandise, such as a wall, fence, or painted line. All inlets and outlets to bonded tanks shall be secured with locks and/or in-bond seals.

(7) *Storage conditions.* Merchandise in the bonded area shall be stored in a safe and sanitary manner to minimize damage to the merchandise, avoid hazards to persons, and meet local, state, and Federal requirements applicable to specific kinds of goods. Doors and entrances shall be left unblocked for access by Customs officers and warehouse proprietor personnel.

(8) *Manner of storage.* Packages shall be received in the warehouse and recorded in the proprietor's inventory and accounting records according to their marks and numbers. Packages containing weighable or gaugeable merchandise not bearing shipping marks and numbers shall be received under the weigher's or gauger's numbers. Packages with exceptions due to damage or loss of contents, or not identical as to quantity or quality of contents shall be stored separately until the discrepancy is resolved with Customs. Merchandise received in the warehouse shall be stored in a manner directly identifying the merchandise with the entry, general order, or seizure number; using a unique identifier for inventory categories composed of fungible merchandise accounted for on a First-In-First-Out (FIFO) basis; or using a unique identifier for inventory categories composed of fungible merchandise accounted for using another approved alternative inventory method.

(i) *Direct identification.* The warehouse proprietor shall mark all shipments for identification, showing the general order or warehouse entry number or seizure number and the date of the general order, entry, or delivery ticket in the case of seizures. Containers covered by a given warehouse entry, general order or seizure shall not be mixed with goods covered by any other entry, general order or seizure. Merchandise

covered by a given warehouse entry, general order or seizure may be stored in multiple locations within the warehouse if the proprietor's inventory control system specifically identifies all locations where merchandise for each entry, general order or seizure is stored and the quantity in each location. The proprietor must provide, upon request by a Customs officer, a record balance of goods, specifying the quantity in each storage location, covered by any warehouse entry, general order, or seizure so a physical count can be made to verify the accuracy of the record balance.

(ii) *FIFO.* A proprietor may account for fungible merchandise on a First-In-First-Out (FIFO) basis instead of specific identification by warehouse entry number, provided the merchandise meets the criteria for fungibility and the recordkeeping requirements contained in § 19.12 of this part are met. As of the beginning date of FIFO procedures, each kind of fungible merchandise in the warehouse under FIFO shall constitute a separate inventory category. Each inventory category shall be assigned a unique number or other identifier by the proprietor to distinguish it from all other inventory categories under FIFO. All of the merchandise in a given inventory category shall be physically placed so as to be segregated from merchandise under other inventory categories or merchandise accounted for under other inventory methods. The unique identifier shall be marked on the merchandise, its container, or the location where it is stored so as to clearly show the inventory category of each article under FIFO procedures. Merchandise covered by a given unique identifier may be stored in multiple locations within the warehouse if the proprietor's inventory control system specifically identifies all locations where merchandise for a specific unique identifier is stored and the quantity in each location. The proprietor must provide, upon request by a Customs officer, a record balance of goods, specifying the quantity in each storage location, covered by any warehouse entry, general order, seizure, or unique identifier so a physical count can be made to verify the accuracy of the record balance.

(iii) *Other alternative inventory methods.* Other alternative inventory systems may be used, if Customs approval is obtained. Importers or proprietors who wish to use an alternative inventory method other than FIFO must apply to Customs Headquarters, Office of Regulations and Rulings, for approval.

(9) *Miscellaneous responsibilities.* The proprietor is responsible for complying with requirements for transport to his warehouse, deposit, manipulation, manufacture, destruction, shortage or overage, inventory control and recordkeeping systems, and other requirements as specified in this part.

5. Section 19.6 is amended by revising the fourth sentence of paragraph (a)(1), paragraph (d)(1), and the sixth sentence of paragraph (d)(2), by redesignating paragraph (d)(4) as (d)(5) and by adding a new paragraph (d)(4), to read as follows:

§ 19.6 Deposits, withdrawals, blanket permits to withdraw and sealing requirements.

(a)(1) *Deposit in warehouse.* * * * A copy of any joint report of discrepancy shall be made within five business days of agreement and provided to the port director on the appropriate cartage documents as set forth in § 125.31 of this chapter. * * *

* * * * * * *

(d) *Blanket permits to withdraw.* (1) *General.* (i) Blanket permits may be used to withdraw merchandise from bonded warehouses for:

(A) Delivery to individuals departing directly from the Customs territory for exportation under the sales ticket procedure of § 144.37(h) of this chapter (Class 9 warehouses only);

(B) Aircraft or vessel supplies under § 309 or 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317); or

(C) The personal or official use of personnel of foreign governments and international organizations set forth in subpart I, part 148 of this chapter; or

(D) A combination of the foregoing.

(ii) Blanket permits to withdraw may be used only for delivery at the port where withdrawn and not for transportation in bond to another port, except for a withdrawal for transportation to another port by a duty-free sales enterprise which meets the requirements for exemption as stated in § 144.34(c) of this chapter. Blanket permits to withdraw may not be used for delivery to a location for retention or splitting of shipments under the provisions of § 18.24 of this chapter. A withdrawer who desires a blanket permit shall state in capital letters on the warehouse entry, or on the warehouse entry/entry summary when used as an entry, that "Some or all of the merchandise will be withdrawn under blanket permit per section 19.6(d), C.R." Customs acceptance of the entry will constitute approval of the blanket permit. A copy of the entry will be delivered to the proprietor, whereupon merchandise may be withdrawn under the terms of the blanket permit. The permit may be revoked by the port director in favor of individual applications and permits if the permit is found to be used for other purposes, or if necessary to protect the revenue or properly enforce any law or regulation Customs is charged with administering. Merchandise covered by an entry for which a blanket permit was issued may be withdrawn for purposes other than those specified in this paragraph if a withdrawal is properly filed as required in subpart D, part 144, of this chapter.

(2) *Withdrawals under blanket permit.* * * * A copy of the withdrawal shall be retained in the records of the proprietor as provided in § 19.12(d)(4) of this part. * * *

* * * * * * *

(4) *Withdrawals under blanket permit for aircraft or vessel supplies.* Multiple withdrawals under a blanket permit for aircraft or vessel supplies, if consigned to the same daily aircraft flight number or vessel sailing, may be filed on one Customs Form 7512; however, an attachment

form, developed by the warehouse proprietor and approved by the port director may be used for all withdrawals. This attachment form shall provide a sufficient summary of the goods being withdrawn, and shall include the warehouse entry number, the quantity and wight being withdrawn, the Harmonized Tariff Schedule of the United States number(s), the value of the goods, import and export lading information, the duty rate and amount, and any applicable Internal Revenue tax calculation, for each warehouse entry being withdrawn. A copy of Customs Form 7512 and the summary attachment must be attached to each permit file folder unless the warehouse proprietor qualifies for the permit file folder exemption under § 19.12(d)(4)(iii) of this part.

* * * * * * *

6. Section 19.11 is amended by revising paragraph (h) to read as follows:

§ 19.11 Manipulation in bonded warehouses and elsewhere.

* * * * * * *

(h) Merchandise which has been entered for warehouse and placed in a Class 9 warehouse (duty-free store) may be unpacked into its smallest irreducible unit for sale without a prior permit issued by the port director. The port director may issue a blanket permit to a duty-free store for up to one year permitting the destruction of merchandise covered by any entry and found to be nonsaleable, if the merchandise to be destroyed is valued at less than 5 percent of the value of the merchandise at time of entry or $1250, whichever is less, in its undamaged condition. Such permit may be revoked in favor of a permit for each entry and/or destruction whenever necessary to assure proper destruction and protection of the revenue. The proprietor shall maintain a record of unpacking merchandise into saleable units and destruction of nonsaleable merchandise in its inventory and accounting records.

7. Section 19.12 is revised to read as follows:

§ 19.12 Inventory control and recordkeeping system.

(a) *Systems capability.* The proprietor shall maintain either manual or automated inventory control and recordkeeping systems or combination manual and automated systems capable of:

(1) Accounting for all merchandise transported, deposited, stored, manipulated, manufactured, smelted, refined, destroyed or removed from the bonded warehouse and all merchandise collected by a proprietor or his agent for transport to his warehouse. The records shall provide an audit trail from deposit through manipulation, manufacture, destruction, and withdrawal from the bonded warehouse either by specific identification or other Customs authorized inventory method. The records to be maintained are those which a prudent businessman in the same type of business can be expected to maintain. The records are to be kept in sufficient detail to permit effective and efficient determination by Customs of the proprietor's compliance with these regulations and correctness of his annual submission or reconciliation;

(2) Producing accurate and timely reports and documents as required by this part; and

(3) Identifying shortages and overages of merchandise in sufficient detail to determine the quantity, description, tariff classification and value of the missing or excess merchandise so that appropriate reports can be filed with Customs on a timely basis.

(b) *Procedures manual.* (1) The proprietor shall have available at the warehouse an English language copy of its written inventory control and recordkeeping systems procedures manual in accordance with the requirements of this part.

(2) The proprietor shall keep current its procedures manual and shall submit to the port director a new certification at the time any change in the system is implemented.

(c) *Entry of merchandise into a warehouse.*

(1) *Identification.* All merchandise collected by a proprietor or his agent for transport to his warehouse shall be receipted. In addition, all merchandise entered in a warehouse will be recorded in a receiving report or document using a Customs entry number or unique identifier if an alternate inventory control method has been approved. All merchandise will be traceable to a Customs entry and supporting documentation.

(2) *Quantity verification.* Quantities received will be reconciled to a receiving report or document such as an invoice with any discrepancy reported to the port director as provided in § 19.6(a).

(3) *Recordation.* Merchandise received will be accurately recorded in the accounting and inventory system records from the receiving report or document using the Customs entry number or unique identifier if an alternative inventory control method has been approved.

(d) *Accountability for merchandise in a warehouse.*

(1) *Identification of merchandise.* The Customs entry number or unique identifier, as applicable under § 19.4(b)(8), will be used to identify and trace merchandise.

(2) *Inventory records.* The inventory records will specify by Customs entry number or unique identifier if an alternative inventory control method is approved:

(i) The location of the merchandise within the warehouse;

(ii) Except for merchandise in general order, the cost or value of the merchandise, unless the proprietor's financial records maintain cost or value and the records are made available for Customs review; and

(iii) The beginning balance, cumulative receipts and withdrawals, adjustments, destructions, and current balance on hand by date and quantity.

(3) *Theft, shortage, overage or damage.* Any theft or suspected theft or overage or any extraordinary shortage or damage (equal to one percent or more of the value of the merchandise in an entry or covered by a unique identifier; or if the missing merchandise is subject to duties and taxes in excess of $100) shall be immediately brought to the attention of

the port director, and confirmed in writing within five business days after the shortage, overage, or damage has been brought to the attention of the port director. An entry for warehouse must be filed for all overages by the person with the right to make entry within five business days of the date of discovery. The applicable duties, taxes and interest on thefts and shortages so reported shall be paid by the responsible party to Customs within 20 calendar days following the end of the calendar month in which the shortage is discovered. The port director may allow the consolidation of duties and taxes applicable to multiple shortages into one payment; however, the amount applicable to each warehouse entry is to be listed on the submission and shall specify the applicable duty, tax and interest. These same requirements shall apply when cumulative thefts, shortages or overages under a specific entry or unique identifier total one percent or more of the value of the merchandise or if the duties and taxes owed exceed $100. Upon identification, the proprietor shall record all shortages and overages in its inventory control and recordkeeping system, whether or not they are required to be reported to the port director at the time. The proprietor shall also record all shortages and overages as required in the Customs Form 300 or annual reconciliation report under paragraphs (f) or (g) of this section, as appropriate. Duties and taxes applicable to any non-extraordinary shortage or damage and not required to be paid earlier shall be submitted to the port director at the time the Warehouse Proprietor's Submission, Customs Form 300 is due or at the time the certification of preparation of the annual reconciliation report is due, as prescribed in paragraphs (g) and (h) of this section, or at any time prior to the annual filing of the CF 300 or certified annual reconciliation. Discrepancies found in a Class 9 warehouse with integrated locations as set forth in § 19.35(c) will be the net discrepancies for a unique identifier (see § 19.4(b)(8)(ii) of this part) such that overages within one sales location will be offset against shortages in another location that is within the integrated location. A Class 9 proprietor who transfers merchandise between facilities in different ports without being required to file a rewarehouse entry in accordance with § 144.34 of this chapter may offset overages and shortages within the same unique identifier for merchandise located in stores in different ports (see § 19.4(b)(8)(ii) of this part).

(4) *Permit file folders.* (i) *Maintenance.* Permit file folders shall be maintained and kept up to date by filing all receipts, damage or shortage reports, manipulation requests, withdrawals, removals and blanket permit summaries within five business days after the event occurs. The permit file folders shall be kept in a secure area and shall be made available for inspection by Customs at all reasonable hours.

(ii) *Review.* When the final withdrawal of merchandise relating to a specific warehouse entry, general order or seizure occurs, the warehouse proprietor shall: review the permit file folder to ensure that all necessary documentation is in the file folder accounting for the merchandise covered by the entry; notify Customs of any merchandise cov-

ered by the warehouse entry, general order or seizure which has not been withdrawn or removed; and file the permit file folder with Customs within 30 calendar days after final withdrawal, except as allowed by paragraph (b)(4)(iv) of this section. The permit file folder for merchandise not withdrawn during the general order period shall be submitted to the port director upon receipt from Customs of the Customs Form 6043.

(iii) *Exemption to maintenance requirement.* Maintenance of permit file folders will not be required, if the proprietor has an automated system capable of: satisfactorily summarizing all actions by Customs warehouse entry; providing upon demand by Customs an entry activity summary report which lists all individual receipts, withdrawals, destructions, manipulations and adjustments by warehouse entry and is cross-referenced to the source documents for each transaction; and maintaining source documents so that the documents can be readily retrieved upon request. Failure to provide the entry activity summary report or documentation supporting the entry activity summary report upon demand by the port director or the field director of regulatory audit could result in reinstatement by the port director of the requirement to maintain the permit file folder for all warehouse entries. When final withdrawal is made, the proprietor must submit the entry activity summary report to Customs. Prior to submission, the proprietor must ensure the accuracy of the summary report and assure that all supporting documentation is on file and available for review if requested by Customs.

(iv) *Exemption to submission requirement.* At the discretion of the port director, a proprietor may be allowed to furnish formal notification of final withdrawal in lieu of the requirement to submit the permit file folder or entry activity summary within 30 calendar days of each final withdrawal. If approved to use this procedure the proprietor could be required by the port director to submit permit file folders or entry activity summaries on a selective basis. Failure to promptly provide the permit file folder or entry activity summary upon request by the port director or the field director of regulatory audit could result in withdrawal of this privilege.

(5) *Physical inventory.* The proprietor shall take at least an annual physical inventory of all merchandise in the warehouse, or periodic cycle counts of selected categories of merchandise such that each category is counted at least once during the year, with prior notification of the date(s) given to Customs so that Customs personnel may observe or participate in the inventory if deemed necessary. If the proprietor of a Class 2 or Class 9 warehouse has merchandise covered by one warehouse entry, but stored in multiple warehouse facilities as provided for under § 144.34 of this chapter, the facility where the original entry was filed must reconcile the on-hand balances at all locations with the record balance for those entries with merchandise in multiple locations. The proprietor shall notify the port director of any discrepancies, re-

cord appropriate adjustments in the inventory control and recordkeeping system, and make required payments and entries to Customs, in accordance with paragraph (d)(3) of this section.

(e) *Withdrawal of merchandise from a warehouse.* All bonded merchandise withdrawn from a warehouse will be accurately recorded within the inventory control and recordkeeping system. The inventory control and recordkeeping system must have the capability to trace all withdrawals back to a Customs entry and to ultimate disposition of the merchandise by the proprietor.

(f) *Special provisions for use of FIFO inventory procedures.* (1) *Notification.* A proprietor who wishes to use FIFO procedures for all or part of the merchandise in a bonded warehouse shall provide the port director a written certification that: the proprietor has read and understands Customs FIFO procedures set forth in this section; the proprietor's procedures are in accordance with Customs FIFO procedures, and the proprietor agrees to abide by those procedures; and the proprietor of a public warehouse will obtain the written consent of any importer using the warehouse before applying FIFO procedures to their merchandise.

(2) *Qualifying merchandise.* FIFO inventory procedures may be used only for fungible merchandise. For purposes of this section, "fungible merchandise" means merchandise which is identical and interchangeable for all commercial purposes. While commercial interchangeability is usually decided between buyer and seller or between proprietor and importer, Customs is the final arbiter of fungibility in bonded warehouses. The criteria for determining whether merchandise is fungible include, but are not limited to, Governmental and recognized industrial standards, part numbers, tariff classification value, brand name, unit of quantity (such as barrels, gallons, pounds, pieces), model number, style and same kind and quality. Fungible textile and textile products which are withdrawn from a Class 9 warehouse may be accounted for using FIFO inventory procedures, inasmuch as such articles would be exempt from textile quotas.

(3) *Merchandise specifically excluded.* FIFO procedures cannot be applied to the following merchandise, as well as any other merchandise which does not comply with the requirements of paragraph (f)(2) of this section:

(i) Merchandise subject to quota, visa or export restrictions chargeable to different countries of origin;

(ii) Textile and textile products of different quota categories;

(iii) Merchandise with different tariff classifications or rates of duty, except where the difference is within the merchandise itself (such as kits, merchandise in unusual containers) or where the tariff classification or dutiability is determined only by conditions upon withdrawal (for example, withdrawal for vessel supplies, bonded wool transactions);

(iv) Merchandise with different legal requirements for marking, labeling or stamping;

(v) Merchandise with different trademarks;
(vi) Merchandise of different grades or qualities;
(vii) Merchandise with different importers of record;
(viii) Damaged or deteriorated merchandise;
(ix) Restricted merchandise; or
(x) General order, abandoned or seized merchandise.

(4) *Maintenance of FIFO.* FIFO procedures used for merchandise in any inventory category, must be used consistently throughout the warehouse storage and recordkeeping practices and procedures for the merchandise. For example, merchandise may not be added to inventory by FIFO but withdrawn by bypassing certain inventory layers to reach a specific warehouse entry other than the oldest one. However, this does not preclude the use of specific identification for some merchandise in a warehouse entry and FIFO for other merchandise, so long as they are segregated in physical storage and clearly distinguished in the inventory and accounting records.

(5) *FIFO recordkeeping.* In the inventory and accounting records, the proprietor shall establish an inventory layer for each warehouse entry represented in each inventory category. The layers shall be established in the order of time of acceptance of the entry or by the date of importation of merchandise covered by each applicable warehouse entry. There shall be no mixing of layering both by time of acceptance and date of importation in the same warehouse. Records for each layer shall, as a minimum, show the warehouse entry number, date of acceptance, date of importation, quantity and unit of quantity. They shall also show for each entry the type of warehouse withdrawal number or other specific removal event charged against the entry, by date and quantity. Each addition to or deduction from the inventory category shall be posted in the appropriate inventory category within 2 business days after the event occurs. All FIFO records and documentation shall consistently use the same unit of quantity within each inventory category.

(6) *Entry requirements.* Warehouse entries covering any merchandise to be accounted for under FIFO must be prominently marked "FIFO" on the face of the entry document. The entry document or an attachment thereto shall show the unique identifier of each inventory category to be accounted for under FIFO, the quantity in each inventory category and the unit of quantity.

(7) *Receipts.* Any shortages, overages, or damage found upon receipt shall be attributed to the entry under which the merchandise was received. FIFO procedures will not take effect until the merchandise is physically placed in the storage location for the inventory category represented in the entry.

(8) *Manipulation.* When manipulation results in a product with a different unique identifier, the inventory and accounting records shall show the quantities of merchandise in each inventroy category appearing in the product covered by the new unique identifier. The withdrawal shall show the unique identifiers of both the materials used in the ma-

nipulation and the product as manipulated. The quantities of the original unique identifiers will be deducted from their respective warehouse entries on a FIFO basis when the resultant product is withdrawn.

(9) *Discontinuance of FIFO.* A proprietor may voluntarily discontinue the use of FIFO procedures for all or part of the merchandise currently under FIFO by providing written notification to the port director. The notification shall clearly describe the merchandise, by commercial names and unique identifiers, to be removed from FIFO. Following notification, the merchandise shall be segregated in both the recordkeeping system and the physical location by warehouse entry number and the quantities so removed shall be deducted from the appropriate FIFO inventory category balances. Merchandise so removed shall be maintained under the specific identification inventory method. FIFO procedures which were voluntarily discontinued may be reinstated, but not for merchandise covered by any warehouse entry for which FIFO was discontinued.

(g) *Warehouse proprietor submission.* Except as otherwise provided in paragraph (h) of this section or § 19.19(b) of this part, the warehouse proprietor shall file with the field director of regulatory audit within 45 calendar days from the end of his business year a Warehouse Proprietor's Submission on Customs Form 300. If the proprietor of a Class 2 or Class 9 warehouse has merchandise covered by one warehouse entry, but stored in multiple warehouse facilities as provided for under § 144.34 of this chapter, the CF 300 shall cover all locations and warehouses of the proprietor. An alternative format may be used for providing the information required on the CF 300, if prior written approval is obtained from the field director of regulatory audit.

(h) *Annual reconciliation.* (1) *Report.* Instead of filing Customs Form 300 as required under paragraph (g) of this section, the proprietor of a class 2, importers' private bonded warehouse, and proprietors of classes 4, 5, 6, 7, 8, and 9 warehouses if the warehouse proprietor and the importer are the same party, shall prepare a reconciliation report within 90 days after the end of the fiscal year unless the field director authorizes an extension for reasonable cause. The proprietor shall retain the annual reconciliation report for 5 years from the end of the fiscal year covered by the report. The report must be available for a spot check or audit by Customs, but need not be furnished to Customs unless requested. There is no form specified for the preparation of the report.

(2) *Information required.* The report must contain the company name; address of the warehouse; class of warehouse; date of inventory or information on cycle counts; a description of merchandise for each entry or unique identifier, quantity on hand at the beginning of the year, cumulative receipts and transfers (by unit), quantity on hand at the end of the year, and cumulative positive and negative adjustments (by unit) made during the year. If the proprietor of a Class 2 or Class 9 warehouse has merchandise covered by one warehouse entry, but stored in multiple warehouse facilities as provided for under § 144.34 of this chapter,

the reconciliation shall cover all locations and warehouses of the proprietor at the same port. If the annual reconciliation includes entries for which merchandise was transferred to a warehouse without filing a rewarehouse entry, as allowed under § 144.34, the annual reconciliation must contain sufficient detail to show all required information by location where the merchandise is stored. For example, if merchandise covered by a single entry is stored in warehouses located in 3 different ports, the annual reconciliation should specify individually the beginning and ending inventory balances, cumulative receipts, transfers, and positive and negative adjustments for each location.

(3) *Certification.* The proprietor shall submit to the field director of regulatory audit within 10 business days after preparation of the annual reconciliation report, a letter signed by the proprietor certifying that the annual reconciliation has been prepared, is available for Customs review, and is accurate. The certification letter must contain the proprietor's IRS number; date of fiscal year end; the name and street address of the warehouse; the name, title, and telephone number of the person having custody of the records; and the address where the records are stored. Reporting of shortages and overages based on the annual reconciliation will be made in accordance with paragraph (d)(3) of this section. Any previously unreported shortages and overages should be reported to the port director and any unpaid duties, taxes and fees should be paid at this time.

(i) *System review.* The proprietor shall perform an annual internal review of the inventory control and recordkeeping system and shall prepare and maintain on file a report identifying any deficiency discovered and corrective action taken, to ensure that the system meets the requirements of this part.

(j) *Special requirements.* A warehouse proprietor submission (CF 300) or annual reconciliation must be prepared for each facility or location as defined in §§ 19.2(a) and 19.35(c) of this part. When merchandise is transferred from one facility or location to another without filing a rewarehouse entry, as provided for in § 144.34(c) of this chapter, the submission/reconciliation for the warehouse where the entry was originally filed should account for all merchandise under the warehouse entry, indicating the quantity in each location.

8. Section 19.13 is amended by revising the fourth sentence of paragraph (g) to read as follows:

§ 19.13 Requirements for establishment of warehouses.

* * * * * * *

(g) *Secure storage.* * * * The areas for storage of bonded material and manufactured products shall be secured in accordance with the standards prescribed in § 19.4(b)(6) of this part. * * *

* * * * * * *

9. Section 19.13a is amended by revising the first sentence of its introductory text and by revising paragraph (b) to read as follows:

§ 19.13a Recordkeeping requirements.

The proprietor of a manufacturing warehouse shall comply with the recordkeeping requirements of §§ 19.4(b) and 19.12.* * *

* * * * * * *

(b) Take an annual physical inventory of the merchandise as provided in § 19.12(d)(5) in conjunction with the annual submission required by § 19.12(g); and

* * * * * * *

10. Section 19.35 is amended by revising the introductory text of paragraph (c) and by revising paragraphs (c)(2), (e)(2) and (f) to read as follows:

§ 19.35 Establishment of duty-free stores (Class 9 warehouses).

* * * * * * *

(c) *Integrated locations*. A Class 9 warehouse with multiple noncontiguous sales and crib locations (see § 19.37(a) of this part) containing conditionally duty-free merchandise and requested by the proprietor may be treated by Customs as one location if:

* * * * * * *

(2) The recordkeeping system is centralized up to the point where a sale is made so as to automatically reduce the sale quantity by location from centralized inventory or inventory records must be updated no less frequently than at the end of each business day to reflect that day's activity.

* * * * * * *

(e) * * *

(2) If brought back to the United States must be declared and is subject to U.S. Federal duty and tax with personal exemption; and,

* * * * * * *

(f) *Security of sales rooms and cribs*. The physical and procedural security requirements of § 19.4(b)(6) of this part shall be applied to the security of the sales rooms and cribs by the port director. The proprietor shall establish procedures to safeguard the merchandise so as to accommodate the movement of purchasers and prospective purchasers of conditionally duty-free merchandise contained in duty-free sales rooms and cribs.

* * * * * * *

11. Section 19.36 is amended by revising the last sentence of paragraph (e) and the third sentence of paragraph (g) to read as follows:

§ 19.36 Requirements for duty-free store operations.

* * * * * * *

(e) *Merchandise eligible for warehousing*. * * * However, such merchandise must be either identified or marked "DUTY-PAID" or "U.S.-ORIGIN", or similar markings, as applicable, so that Customs officers can easily distinguish conditionally duty-free merchandise from other merchandise in the sales or crib area.

* * * * * * *

(g) *Inventory procedure.* * * * The inventory shall be reconcilable with the accounting and inventory records and the permit file folder requirements of § 19.12(d), (e) and (f) of this part. * * *

12. Section 19.37 is amended by revising the first and fourth sentences, and the fifth (and last) sentence of paragraph (a) to read as follows:

§ 19.37 Crib operations.

(a) *Crib.* A crib means a bonded area, separate from the storage area of a Class 9 warehouse, for the retention of a supply of articles for delivery to persons departing from the United States. * * * The quantity of goods in the crib may be an amount requested by the proprietor which is commercially necessary for the delivery operations for a period, if approved by the port director. The port director may increase or decrease the quantity as deemed necessary for the protection of the revenue and proper administration of U.S. laws and regulations, or may order the return to the storage area of goods remaining unsold.

* * * * * * *

13. Section 19.39 is amended by removing the last three sentences of paragraph (c)(2); § 19.39 is further amended by revising the first sentence of paragraph (c)(3), by redesignating paragraphs (c)(4)(ii), (c)(4)(iii) and (c)(4)(iv), as (c)(4)(iii), (c)(4)(iv) and (c)(4)(v), respectively, and adding a new paragraph (c)(4)(ii), and by revising paragraphs (c)(5) and (e), to read as set forth below:

§ 19.39 Delivery for exportation.

* * * * * * *

(c) * * *

(3) *Aircraft Delivery.* The merchandise will be delivered by a licensed cartman for lading as baggage directly on the aircraft on which the passenger will depart. * * *;

(4) *Unit-load delivery.* * * *

(ii) Merchandise shall be placed on the aircraft on which the passenger departs the United States for carriage as passenger baggage;

* * * * * * *

(5) *Cancelled or aborted flights or no-show passengers.* (i) *Cancelled or aborted flights.* The proprietor shall, upon request, make available to Customs the purchaser's name, the purchaser's airline ticket number and the identity and quantity of the merchandise delivered by the proprietor to the purchaser (if the merchandise was delivered to the airline rather than the passenger, the name of the airline employee to whom the merchandise was delivered), and the date and time of that delivery in lieu of retrieving the merchandise for safekeeping until the purchaser actually departs.

(ii) *No-show passengers.* A proprietor who delivers merchandise directly to an airline for delivery to a passenger who does not board the flight shall establish a procedure to obtain redelivery of that merchandise from the airline.

* * * * * * *

(e) *Delivery method.* Delivery of conditionally duty-free merchandise to persons for exportation will be made by licensed cartmen or bonded carriers under the procedures in subpart D, part 125, and § 144.34(a), of this chapter, or under a local control system approved by the port director wherein any discrepancy found in the merchandise will be treated as if it occurred in the bonded warehouse.

* * * * * * *

PART 113—CUSTOMS BONDS

1. The general authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * * * *

2. Section 113.63 is amended by redesignating paragraph (a)(4) as (a)(5) and adding a new paragraph (a)(4), by removing the word "and" from the end of paragraph (b)(2), and by adding the word "and" at the end of paragraph (b)(3), by adding a new paragraph (b)(4), and by revising the first sentence of paragraph (d), to read as follows:

§ 113.63 Basic custodial bond conditions.

(a) * * *

(4) If authorized to use the alternative transfer procedure set forth in § 144.34(c) of this chapter, to operate as constructive custodian for all merchandise transferred under those procedures, thereby assuming primary responsibility for the continued proper custody of the merchandise notwithstanding its geographical location;

* * * * * * *

(b) * * *

(4) If authorized to use the alternative transfer procedure set forth in § 144.34(c) of this chapter, to keep safe any merchandise so transferred.

* * * * * * *

(d) *Agreement to Redeliver Merchandise to Customs.* If the principal is designated a bonded carrier, or licensed to operate a cartage or lighterage business, or authorized to use the alternative transfer procedure set forth in § 144.34(c) of this chapter, the principal agrees to redeliver timely, on demand by Customs, any merchandise delivered to unauthorized locations or to the consignee without the permission of Customs. * * *

* * * * * * *

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The general authority citation for part 144 and the specific authority for § 144.37 continue to read as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1624;

* * * * * * *

Section 144.37 also issued under 19 U.S.C. 1555, 1562.

2. Section 144.34 is amended by adding a new paragraph (c) to read as follows:

§ 144.34 Transfer to another warehouse.

* * * * * * *

(c) *Transfers between integrated bonded warehouses.*

(1) *Eligibility.* (i) Only an importer who will transfer warehoused merchandise among Class 2 and 9 warehouses listed on the application in paragraph (c)(2) of this section is eligible to participate.

(ii) The importer must have a centralized inventory control system that shows the location of all of the warehoused merchandise at all times, including merchandise in transit.

(iii) The importer and its surety must sign the application. If the application to use this alternative procedure is approved by the appropriate port director, the importer's entry bond containing the conditions provided under § 113.62 of this chapter will continue to attach to any merchandise transferred under these alternative procedures.

(iv) Each proprietor of a warehouse listed on the application and each surety who underwrites that proprietor's custodial bond coverage under § 113.63 of this chapter shall sign the application.

(2) *Application.* Application must be made in writing to the port director of the port in which the applicant's centralized inventory control system exists, with copies to all affected port directors, for exemptions from the requirements for transfer of merchandise from one bonded warehouse to another set forth in paragraphs (a) and (b) of this section. The application must list all bonded warehouses to and from which the merchandise may be transferred; all such warehouses must be covered by the same centralized inventory control system. Only blanket exemption requests will be considered; exemptions will not be considered for individual transfers. The application may be in letter form, signed by all participants, and contain a certification to the port director by the applicant that he maintains accounting records, documents and financial statements and reports that adequately support Customs activities.

(3) *Operation.* An importer who receives approval to transfer merchandise between bonded warehouses in accordance with the provisions of this section may, after entry into the first warehouse, transfer that merchandise to any other warehouse without filing a withdrawal from warehouse or a rewarehouse entry. The warehoused merchandise will be treated as though it remains in the first warehouse so long as the actual location of the merchandise at all times is recorded as provided under the provisions of this section.

(4) *Inventory control requirements.* The records required to be maintained must include a centralized inventory control system and supporting documentation which meets the following requirements:

(i) Provide Customs upon demand with the proper on-hand balance of each inventory item in each warehouse facility and each storage location within each warehouse;

(ii) Provide Customs upon demand with the proper on-hand balance for each open warehouse entry and the actual quantity in each warehouse facility;

(iii) If an alternative inventory system has been approved, provide Customs upon demand with the proper on-hand balance for each unique identifier and the quantity related to each open warehouse entry and the quantity in each warehouse facility;

(iv) Maintain documentation for all intracompany movements, including authorizations for the movement, shipping documents and receiving reports. These documents must show the appropriate warehouse entry number or unique identifier, the description and quantity of the merchandise transferred, and must be properly authorized and signed evidencing shipment from and delivery to each location;

(v) Maintain a consolidated permit file folder at the location where the merchandise was originally warehoused. The consolidated permit file folder must meet the requirements of § 19.12(d)(4) of this chapter regardless of the warehouse facility in which the action occurred. Documentation for all intracompany movements, including authorizations for movement, shipping documents, receiving reports, as well as documentation showing ultimate disposition of the merchandise must be filed in the consolidated permit file folder within seven business days;

(vi) Maintain a subordinate permit file at all intracompany locations where merchandise is transferred containing copies of documentation required by § 19.12(d)(4) of this chapter and by paragraph (c)(3)(v) of this section relating to merchandise quantities transferred to the location. A copy of all documents in the subordinate permit file folder must be filed in the consolidated permit file folder within seven business days; no exceptions will be granted to this requirement. When the final withdrawal is made on the respective entry, the subordinate permit file shall be considered closed and filed at the intracompany location to which the merchandise was transferred; and

(vii) File the withdrawal from Customs custody at the original warehouse location at which the merchandise was entered.

(5) *Waiver of permit file folder requirements.* The permit file folder requirements of paragraphs (c)(3)(v) and (c)(3)(vi) of this section may be waived if the proprietor's recordkeeping and inventory control system qualifies under the requirements of § 19.12(d)(4)(iii) of this chapter at all locations where bonded merchandise is stored.

(6) *Procedure not available.* (i) *Liens.* The transfer procedures permitted under paragraph (c) of this section shall not be available for mer-

chandise with respect to which Customs is notified of the existence of a lien, as prescribed in § 141.112 of this chapter (see 19 U.S.C. 1564), until proof shall be produced at the original warehouse location that the lien has been satisfied or discharged.

(ii) *Restricted merchandise.* With the exception of alcohol and tobacco products, merchandise subject to a restriction on release such as covered by a licensing, quota or visa requirement, is not eligible.

3. Section 144.36 is amended by revising paragraphs (c) and (f), by removing the word "or" from the end of paragraph (g)(4), and by adding the word "or" at the end of paragraph (g)(5) and adding a new paragraph (g)(6) thereafter, to read as follows:

§ 144.36 Withdrawal for transportation.

* * * * * * *

(c) *Form.* (1) A withdrawal for transportation shall be filed on Customs Form 7512 in five copies. An extra copy or copies of the Customs Form 7512 may be required for use in connection with the delivery of the merchandise to the bonded carrier and, in the case of alcoholic beverages, two extra copies shall be required for use in furnishing the duty statement to the port director at destination.

(2) Separate withdrawals for transportation from a single warehouse, via a single conveyance, consigned to the same consignee, and deposited into a single warehouse, can be filed on one Customs Form 7512, under one control number, provided that there is an attachment, to be certified by a Customs officer, providing the information for each withdrawal, as required in paragraph (d) of this section. With the exception of alcohol and tobacco products, this procedure shall not be allowed for merchandise which is in any way restricted (for example, quota/visa).

(3) The requirement that a Customs Form 7512 be filed and the information required in paragraph (d) of this section be shown shall not be required if the merchandise qualifies under the exemption in § 144.34(c).

* * * * * * *

(f) *Forwarding procedure.* The merchandise shall be forwarded in accordance with the general provisions for transportation in bond (§§ 18.1 through 18.8 of this chapter). However, when the alternate procedures under § 144.34(c) are employed, the merchandise need not be delivered to a bonded carrier for transportation, and an entry for transportation (Customs Form 7512) and a rewarehouse entry will not be required.

(g) *Procedure at destination.* * * *

(5) * * *; or

(6) Deposited into the proprietor's bonded warehouse or duty free store warehouse without rewarehouse entry as required in § 144.41, if the merchandise qualifies for the exemption specified in § 144.34(c).

* * * * * * *

4. Section 144.37 is amended by revising paragraph (h)(2)(v), and by revising the fourth sentence and the last sentence in the concluding text of paragraph (h)(3), to read as follows:

§ 144.37 Withdrawal for exportation.

* * * * * * *

(h) * * *

(2) * * *

(v) The full name and address of the purchaser. However, the port director may waive the address requirement for all merchandise except for alcoholic beverages in quantities in excess of 4 liters and cigarettes in quantities in excess of 3 cartons. Also, the address requirement is not applicable with respect to purchasers at airport duty-free enterprises; and

* * * * * * *

(3) *Sales ticket register.* * * * The sales ticket register shall be included in the permit file folder with or in lieu of the blanket permit summary, as provided in § 19.6(d)(5) of this chapter. * * * In lieu of placing a copy of sales tickets in each permit file folder, the warehouse proprietor may keep all sales tickets in a readily retrievable manner in a separate file.

5. Section 144.39 is amended by revising its first sentence to read as follows:

§ 144.39 Permit to transfer and withdraw merchandise.

With the exception of merchandise transferred under the procedures of § 144.34(c), if all legal and regulatory requirements are met, the appropriate Customs officer shall approve the application to transfer or withdraw merchandise from a bonded warehouse by endorsing the permit copy and returning it to the applicant. * * *

6. Section 144.41 is amended by revising paragraph (c) to read as follows:

§ 144.41 Entry for rewarehouse.

* * * * * * *

(c) *Combining Separate shipments.* (1) Separate shipments consigned to the same consignee and received under separate withdrawals for transportation may be combined into one rewarehouse entry if the warehouse withdrawals are from the same original warehouse entry.

(2) Shipments covered by multiple warehouse entries, and shipped from a single warehouse under separate withdrawals for transportation, via a single conveyance, may be combined into one rewarehouse entry if consigned to the same consignee and deposited into a single warehouse. With the exception of alcohol and tobacco products, this procedure shall not be allowed for merchandise which is in any way restricted (for example, quota/visa). The combined rewarehouse entry shall have attached either copies of each warehouse entry package which is being combined into the single rewarehouse entry or a summary with pertinent information, that is, the date of importation, commodity description, size, HTSUS and entry numbers, for all entries

withdrawn for consolidation as one rewarehouse entry. Any combining of separate withdrawals into one rewarehouse entry shall result in the rewarehouse entry being assigned the import date of the oldest entry being combined into the rewarehouse entry.

(3) Combining of separate shipments shall be prohibited in all other circumstances.

* * * * * * *

GEORGE J. WEISE,
Commissioner of Customs.

Approved: March 5, 1997.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, April 3, 1997 (62 FR 15831)]

(T.D. 97–20)

TUNA FISH—TARIFF-RATE QUOTA

THE TARIFF-RATE QUOTA FOR CALENDAR YEAR 1997, ON TUNA CLASSIFIABLE UNDER SUBHEADING 1604.14.20, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (HTSUS).

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1997.

SUMMARY: Each year the tariff-rate quota for tuna fish described in subheading 1604.14.20, HTSUS, is based on the United States canned tuna production for the preceding calendar year.

EFFECTIVE DATES: The 1997 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1997.

FOR FURTHER INFORMATION CONTACT:

Cynthia Porter, Supervisor, Quota, Import Operations, Trade Compliance Division, Office of Field Operations, U.S. Customs Service, Washington, D.C. 20229, (202) 927–5399. It has now been determined that 35,662,163 kilograms of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1997, at the rate of 6 percent ad valorem under subheading 1604.14.20, HTSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of

this quota will be dutiable at the rate of 12.5 percent ad valorem under subheading 1604.14.30 HTSUS.

Dated: March 18, 1997.

GEORGE J. WEISE,
Commissioner.

[Published in the Federal Register, April 8, 1997 (62 FR 16890)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 2–1997)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of February 1997 follow. The last notice was published in the CUSTOMS BULLETIN on March 12, 1997.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: April 1, 1997.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

03/21/97 U.S. CUSTOMS SERVICE PAGE 1
10:43:48 IPR RECORDATIONS ADDED IN FEBRUARY 1997 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9700017	19970214	20170214	AB SHAPER PACKAGING	NEW STAR TOYS & GIFTS, INC.	N
COP9700018	19970218	20170211	BVLGARI WOMEN LINE PERFUME BOX	BULGARI S.P.A.	N
COP9700019	19970218	20170211	YELLOW GRAPHIC DESIGN PRINT FOR BVLGARI WOMEN LINE	BULGARI S.P.A.	N
COP9700020	19970218	20170211	BVLGARI MEN LINE PERFUME BOX	BULGARI S.P.A.	N
COP9700021	19970218	20170211	GARDEN PARTY BARBIE	MATTEL INC.	N
COP9700022	19970218	20170218	MOTHER GOOSE'S FARM & LEARNING CD-ROM SET	MATTEL INC.	N
COP9700023	19970219	20170219	BARBIE STORYMAKER CD-ROM	MATTEL INC.	N
COP9700024	19970219	20170219	DIABLO	BLIZZARD ENTERTAINMENT	N
COP9700025	19970221	20170221	MIGHTY DUCKS	DISNEY ENTERPRISES, INC.	N
COP9700026	19970225	20170225	GARGOYLES	BUENA VISTA TELEVISION	N
COP9700027	19970225	20170225	TETRIS & DR. MARIO (SNES VERSION)	NINTENDO OF AMERICA	N
COP9700028	19970226	20170226	BULGARI EAU PARFUMEE BOX	BULGARI S.P.A.	N
COP9700029	19970228	20170228	SUPER MARIO 64 (N64 VERSION)	NINTENDO OF AMERICA	N
SUBTOTAL RECORDATION TYPE		13			
TMK9700084	19970206	20041129	DAVE MATTHEW BAND	BAMA RAGS INC.	N
TMK9700085	19970206	20030216	MIDNIGHT MADNESS	INGRAM ENTERPRISES, INC.	Y
TMK9700086	19970206	20031005	COLOR ME AMERICA	INGRAM ENTERPRISES, INC.	N
TMK9700087	19970206	20050509	CALIFORNIA DREAMIN	INGRAM ENTERPRISES, INC.	Y
TMK9700088	19970207	20061217	MISCELLANEOUS DESIGN	TAYLOR MADE GOLF COMPANY	N
TMK9700089	19970210	20020121	DIVINE NO. 10 AND DESIGN	PERFUMER'S WORKSHOP, LTD.	N
TMK9700090	19970211	20010129	MASTROBERARDINO	AZIENDA VINICOLA MICHELE MASTROB	N
TMK9700091	19970211	20010326	HAWAII'S FAMOUS HULI-HULI SAUCE	PACIFIC POULTRY COMPANY, LIMITED	N
TMK9700092	19970213	20060423	NEW STAR AND DESIGN	NEW STAR ORIENTAL CORP.	Y
TMK9700093	19970214	20061228	MISCELLANEOUS DESIGN	MINIGRIP, INC.	N
TMK9700094	19970221	20060827	GABBANELLI	GABBANELLI ACCORDIONS & IMPORTS	Y
TMK9700095	19970219	20040726	GUMMY MELLOS	WILHELM SCHMITZ-SCHOLL	N
TMK9700096	19970219	20050411	U.S. DESIGNER PREMIUM QUALITY FIREWORKS & DESIGN	WOLVERINE FIREWORKS DISPLAY INC.	Y
TMK9700097	19970219	20030802	ALISEO STYLIZED	ALISEO DIFFUSION, S.A.	N
TMK9700098	19970219	20090516	ALISEO STYLIZED AND DESIGN	ALISEO DIFFUSION, S.A.	N
TMK9700099	19970221	20020706	GEMINI VALVE AND DESIGN	PARKER & HARPER COMPANIES, INC.	N
TMK9700100	19970221	19990102	GEMINI VALVE AND DESIGN	PARKER & HARPER COMPANIES, INC.	N
TMK9700101	19970221	20061217	TE TETOHUXTLE/TEA TETOHUXTLE STYLIZED AND DESIGN	INTERCOUNTRIES CO. (PARTNERSHIP)	N
TMK9700102	19970224	20051017	CERIANI	STORZ PERFORMANCE, INC.	Y
TMK9700103	19970225	20000901	SLIM JIM	GFI HOLDINGS INC.	N
TMK9700104	19970225	20050402	NETWARE STYLIZED	NOVELL, INC.	N
TMK9700105	19970225	20050604	NOVELL	NOVELL, INC.	N
TMK9700106	19970225	20050416	MURRAY & DESIGN	MOOG AUTOMOTIVE INC.	N
TMK9700107	19970225	20021024	MURRAY	MOOG AUTOMOTIVE INC.	N
TMK9700108	19970225	20080524	EVERCO	MOOG AUTOMOTIVE INC.	N
TMK9700109	19970225	20040806	MOOG & DESIGN	MOOG AUTOMOTIVE INC.	N
TMK9700110	19970225	20090705	MOOG	MOOG AUTOMOTIVE INC.	N
TMK9700111	19970225	20040723	MOOG	MOOG AUTOMOTIVE INC.	N
TMK9700112	19970225	20040306	ANCO & DESIGN	COOPER AUTOMOTIVE INC.	N
TMK9700113	19970225	19980829	ANCO	COOPER AUTOMOTIVE INC.	N
TMK9700114	19970225	20000217	ANCO	COOPER AUTOMOTIVE INC.	N
TMK9700115	19970225	20000501	ZANXX	COOPER AUTOMOTIVE INC.	N
TMK9700117	19970225	20050723	NOVELL AND DESIGN	NOVELL, INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9700118	19970225	20040812	CHAMPION	CHAMPION SPARK PLUG COMPANY	N
TMK9700119	19970225	20010217	CHAMPION	CHAMPION SPARK PLUG COMPANY	N
TMK9700120	19970225	20040730	CHAMPION & DESIGN	CHAMPION SPARK PLUG COMPANY	N
TMK9700121	19970225	20090405	CHAMPION & DESIGN	CHAMPION SPARK PLUG COMPANY	N
TMK9700122	19970225	20060625	VINTAGE HOME	L. KEE & CO. INC.	Y
TMK9700123	19970225	20020310	ARROW	CLUETT PEABODY RESOURCES CORP	Y
TMK9700124	19970225	20081122	ZANXX DESIGN	COOPER AUTOMOTIVE INC.	N
TMK9700125	19970225	19970508	HUK.A.POO AND DESIGN	D. STONE INDUSTRIES INC.	Y
TMK9700126	19970227	20060423	SOLO	JOSEPH CHARLES BOTTLING WORKS	N
TMK9700127	19970225	20060518	ASTA	FISSLER GMBH	N
TMK9700128	19970226	19971213	POWER PATH	COOPER INDUSTRIES INC.	N
TMK9700129	19970226	20060723	POWERPATH	COOPER INDUSTRIES INC.	N
TMK9700130	19970226	20060213	LET LOK	HAM-LET (ISRAEL CANADA) LTD.	N
TMK9700131	19970226	20060611	HAM-LET & DESIGN	HAM-LET (ISRAEL CANADA) LTD.	N
TMK9700132	19970228	20051109	SEKONIC	MAMIYA AMERICA CORPORATION	Y
TMK9700133	19970228	20000621	WAGNER AND DESIGN	WAGNER ELECTRIC CORPORATION	N
TMK9700134	19970228	20000628	WAGNER AND DESIGN	WAGNER ELECTRIC CORPORATION	N
TMK9700135	19970228	20040128	ABEX	WAGNER ELECTRIC CORPORATION	N
TMK9700136	19970228	19970809	COACH & DESIGN	SARA LEE CORPORATION	N
TMK9700137	19970228	20030625	COACH LEATHERWARE & TAG DESIGN	SARA LEE CORPORATION	N
TMK9700138	19970228	20030625	COACH	SARA LEE CORPORATION	N
TMK9700139	19970228	20041218	COACH PLUS DESIGN	SARA LEE CORPORATION	N

SUBTOTAL RECORDATION TYPE 55

TOTAL RECORDATIONS ADDED THIS MONTH 68

COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR WEARING APPAREL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal of proposed change of practice.

SUMMARY: This notice advises the public that Customs is withdrawing its proposed change of practice regarding the country of origin marking of wearing apparel. As provided in T.D. 54640(6), wearing apparel, such as shirts, blouses, coats, sweaters, etc., must be marked with the name of the country of origin by means of a fabric label or label made from natural or synthetic film, sewn or otherwise permanently affixed on the inside center of the neck midway between the shoulder seams or in that immediate area, or otherwise permanently marked in that area in some other manner. Button tags, string tags and other hang-tags, paper labels, and other similar methods of marking will not be acceptable.

EFFECTIVE DATE: Withdrawal effective April 7, 1997.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification & Marking Branch, Office of Regulations & Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

A proposed change of practice was published in the Federal Register (60 FR 57621) on November 16, 1995, advising the public that Customs intended to review the country of origin marking of certain wearing apparel. By T.D. 54640(6), 93 Treas. Dec. 301 (1958), Customs requires wearing apparel, such as shirts, blouses, coats, sweaters, etc., to be legibly and conspicuously marked with the name of the country of origin by means of a fabric label or label made from natural or synthetic film, sewn or otherwise permanently affixed on the inside center of the neck midway between the shoulder seams or in that immediate area, or otherwise permanently marked in that area in some other manner. Button tags, string tags and other hang-tags, paper labels and other similar methods of marking are not considered acceptable.

The proposed change of practice, if adopted, would have modified that portion of T.D. 54640(6) relating to the requirement of a fabric label or

label made from natural or synthetic film sewn to the article, and the disallowance of button tags, string tags and other hang tags, paper labels and other similar methods of marking. Rather, it was proposed to evaluate the country of origin marking of wearing apparel, such as shirts, blouses, coats, sweaters, etc., on a case-by-case basis to determine if it is conspicuous, legible, indelible, and permanent to a degree sufficient enough to remain on the shirt until it reaches the ultimate purchaser.

The notice of the proposed change of practice arose from a ruling request dated June 1, 1994, concerning the country of origin marking on a man's football shirt which featured a woven textile label, identified as a "jock tag," 2 inches long by 4½ inches wide, stitched on the exterior right-hand side of the shirt, approximately 2 inches above the bottom hem and 1 inch from the side seam. Embroidered on the left side of this label in red and blue threads on a white background was a stitched logo and trade name. The size of the garment, care instructions, the country of origin, and RN number were stitched on the right side of the label in bright blue lettering on a light background. The inquirer requested that Customs allow the use of a hang-tag in the center of the neck midway between the shoulder seams to indicate the country of origin of the shirt, rather than require a sewn-in label since the woven textile label on the outside of the shirt satisfies the conspicuous, legible, indelible, and permanent requirements of 19 U.S.C. 1304.

Customs has provided an exception to the sewn-in label requirement of T.D. 54640(6) only in the context of reversible garments. By T.D. 55015(4), 95 Treas. Dec. 3 (1960), the country of origin marking of reversible garments was permitted to be looped around a hanger. On the basis of this extension, Customs has allowed ladies reversible jackets to be marked with a cardboard hang-tag affixed to the neck area by means of a plastic anchor tag. Customs noted that since the jacket was reversible, a fabric label sewn into the jacket could damage the jacket when the label was removed. *See* Headquarters Ruling Letter (HRL) 731513 dated November 15, 1988. Similarly, in HRL 733890 dated December 31, 1990, Customs allowed women's reversible silk tank tops to be marked with a cloth label, showing the country of origin and other pertinent information sewn into a lower side seam, and a hang-tag which also provided the required information attached at the neck. *See also* HRL 734889 dated June 22, 1993.

Upon request, an extension of time to March 15, 1996, within which to submit comments on the proposal was granted, and a notice to that effect was published in the Federal Register (61 FR 3763) on February 1, 1996.

Analysis of Comments

Seventeen comments were received in response to the notice; seven favored the change of practice, ten opposed. Supporters of the change stated their belief that a more flexible approach, other than only allowing a sewn-in label, will be consistent with the conspicuous and perma-

nent requirements of 19 U.S.C. 1304. Several commenters stated that, as with sewn-in labels, other marking methods would have to be permanently affixed to the garment sufficient enough to remain on the article until it reaches the ultimate consumer. Some supporters stated that hang-tags display the country of origin more conspicuously than sewn-in labels, and compliance costs would decrease if sewn-in labels were not required.

Several commenters alleged that the use of sewn-in labels has not discouraged unlawful behavior, and a company determined to misrepresent the true country of origin will simply sew in false labels. Supporters also stated that hang-tags withstand normal commercial and retail handling. These commenters also alleged that sewn-in labels irritate the consumer's neck, and that the garment may be damaged when the label is removed from the garment. The supporters also noted that the Federal Trade Commission country of origin requirement (16 CFR 303.15) does not require a sewn-in label. One commenter also stated that under NAFTA and the Uruguay Round Agreements Act, the U.S. made commitments to achieve global harmonization in labeling regulations, and the use of other means other than a sewn-in label would facilitate cross-border trade and just-in-time deliveries. However, while supporters favored a more flexible approach, several commenters suggested that rather than a case-by-case evaluation, Customs should establish clear standards as to acceptable alternatives to sewn-in labels.

All of the comments opposing the proposal alleged that methods of marking, other than sewn-in labels, will make it easier to transship garments and misrepresent the true country of origin by changing the label without damaging the garment. The easiest method of discovering transshipments is claimed to either be an incorrect country of origin label, a missing country of origin label, or a damaged country of origin label. One commenter stated that the reason for section 334 of the Uruguay Round Agreements Act (codified at 19 U.S.C. 2592) is to improve the ability to track and investigate illegal transshipments, especially in circumstances where assembly confers origin and the country of origin label is sewn into the good in the country of assembly.

Some of the opposing commenters also stated that the use of hang-tags, paper labels, or other markings not permanently attached will not satisfy the requirements of 19 U.S.C. 1304 that the country of origin marking shall be in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit. Another commenter stated that consumers know and have expected for 40 years that the care label shows the country of origin. Some commenters stated that hang-tags are often lost during packing and shipping, when garments are tried on, when hangers are switched or not used, or are discarded at the point of sale by sales people who see little or no need for them and may even see them as a deterrent to a sale. Finally, one commenter stated that there would be less concern over the proposed modification

of T.D. 54640(6) if permanent country of origin markings were required for articles made in the U.S.

WITHDRAWAL OF PROPOSED CHANGE OF PRACTICE

Customs has determined, after reviewing all of the comments and upon considering all factors, that the requirement imposed by T.D. 54640(6) shall remain in effect. As required by 19 CFR 134.41, the degree of permanence should be at least sufficient to insure that in any reasonably foreseeable circumstance the marking shall remain on the article until it reaches the ultimate purchaser unless it is deliberately removed. All of the commenters in opposition to hang-tags have warned against the deliberate removal of hang-tags. While supporters claim that hang-tags remain on an article until it reaches the ultimate purchaser and that any misrepresentation of the true country of origin usually occurs at the time of assembly, it is Customs' opinion that because of the long-standing expectations by importers and ultimate purchasers that the country of origin marking will be found at the center of the neckline on a sewn-in label, the requirements of T.D. 54064(6) should remain in effect without modification. Accordingly, the subject proposed change of practice is withdrawn.

Therefore, wearing apparel, such as shirts, blouses, coats, sweaters, etc., must be marked with the name of the country of origin by means of a fabric label or label made from natural or synthetic film, sewn or otherwise permanently affixed on the inside center of the neck midway between the shoulder seams or in that immediate area, or otherwise permanently marked in that area in some other manner. Button tags, string tags and other hang-tags, paper labels, and other similar methods of marking will not be acceptable. While Customs has allowed and will continue to allow, due to exigent circumstances, various exceptions from the required location of the sewn-in label, no exception from the sewn-in (permanently affixed) labeling requirement imposed by T.D. 54640(6) will be granted, other than the one allowed under T.D. 55015(4), and proposals for further exceptions from T.D. 54640(6) will not be evaluated on a case-by-case basis.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: March 5, 1997.
DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, April 7, 1997 (62 FR 16644)]

LIST OF FOREIGN ENTITIES VIOLATING TEXTILE TRANSSHIPMENT AND COUNTRY OF ORIGIN RULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public of foreign entities which have been issued a penalty claim under § 592 of the Tariff Act of 1930, for certain violations of the customs laws. This list is authorized to be published by § 592A of the Tariff Act of 1930.

FOR FURTHER INFORMATION CONTACT: For information regarding any of the operational aspects, contact Michael Compeau, Chief, Seizures and Penalties, at 202–927–0762. For information regarding any of the legal aspects, contact Ellen McClain, Office of Chief Counsel, at 202–927–6900.

SUPPLEMENTARY INFORMATION

BACKGROUND

Section 333 of the Uruguay Round Agreements Act (URAA)(Public Law 103–465, 108 Stat. 4809)(signed December 8, 1994), entitled Textile Transshipments, amended Part V of title IV of the Tariff Act of 1930 by creating a § 592A (19 U.S.C. 1592a), which authorizes the Secretary of the Treasury to publish in the Federal Register, on a biannual basis, a list of the names of any producers, manufacturers, suppliers, sellers, exporters, or other persons located outside the customs territory of the United States, when these entities have been issued a penalty claim under § 592 of the Tariff Act of 1930, for certain violations of the customs laws, provided that certain conditions are satisfied.

The violations of the customs laws referred to above are the following: (1) Using documentation, or providing documentation subsequently used by the importer of record, which indicates a false or fraudulent country of origin or source of textile or apparel products; (2) Using counterfeit visas, licenses, permits, bills of lading, or similar documentation, or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation that is subsequently used by the importer of record, with respect to the entry into the customs territory of the United States of textile or apparel products; (3) Manufacturing, producing, supplying, or selling textile or apparel products which are falsely or fraudulently labeled as to country of origin or source; and (4) Engaging in practices which aid or abet the transshipment, through a country other than the country of origin, of textile or apparel products in a manner which conceals the true origin of the textile or apparel products or permits the evasion of quotas on, or voluntary restraint agreements with respect to, imports of textile or apparel products.

If a penalty claim has been issued with respect to any of the above violations, and no petition in response to the claim has been filed, the name of the party to whom the penalty claim was issued will appear on

the list. If a petition, supplemental or relief from the penalty claim is submitted under 19 U.S.C. 1618, in accord with the time periods established by §§ 171.32 and 171.33, Customs Regulations (19 CFR 171.32, 171.33) and the petition is subsequently denied or the penalty is mitigated, and no further petition, if permitted, is received within 30 days of the denial or allowance of mitigation, then the administrative action shall be deemed to be final and administrative remedies will be deemed to be exhausted. Consequently, the name of the party to whom the penalty claim was issued will appear on the list. However, provision is made for an appeal to the Secretary of the Treasury by the person named on the list, for the removal of its name from the list. If the Secretary finds that such party has not committed any of the enumerated violations for a period of not less than 3 years after the date on which the party's name was published, the name will be removed from the list as of the next publication of the list.

Reasonable Care Required

Section 592A also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labeling that are accurate as to its origin. Under § 592A, reliance solely upon information regarding the imported product from a person named on the list does not constitute the exercise of reasonable care.

Textile and apparel importers who have some commercial relationship with one or more of the listed parties must exercise a degree of reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labeling, is accurate as to the country of origin of the merchandise. This degree of reasonable care must rely on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to § 592A, an importer should consider the following questions in attempting to ensure that the documentation, packaging, and labeling is accurate as to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

1) Has the importer had a prior relationship with the named party?

2) Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

3) Has the importer visited the company's premises and ascertained that the company has the capacity to produce the merchandise?

4) Where a claim of substantial transformation is made, has the importer ascertained that the named party actually substantially trnasforms the merchandise?

5) Is the named party operating from the same country as is represented by that party on the documentation, packaging or labeling?

6) Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

7) What is the history of this country regarding this commodity?

8) Have you asked questions of your supplier regarding the origin of the product?

9) Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

On October 2, 1996, Customs published a Notice in the Federal Register (61 FR 51492) which identified 14 (fourteen) entities which fell within the purview of § 592A of the Tariff Act of 1930.

592A LIST

For the period ending March 31, 1997, Customs has identified 14 (fourteen) foreign entities that fall within the purview of § 592A of the Tariff Act of 1930. This list reflects the addition of 1 new entity to the 14 entities named on the list published on October 2, 1996, and the removal of one entity, Hangzhou Tongda Textile Group, from the list. The parties on the current list were assessed a penalty claim under 19 U.S.C. 1592, for one or more of the four above-described violations. The administrative penalty action was concluded against the parties by one of the actions noted above as having terminated the administrative process.

The names and addresses of the 14 foreign parties which have been assessed penalties by Customs for violations of § 592 are listed below pursuant to § 592A. This list supersedes any previously published list. The names and addresses of the 14 foreign parties are as follows:

Azmat Bangladesh, Plot Number 22–23, Sector 2 EPZ, Chittagong 4233, Bangladesh.

Bestraight Limited, Room 5K, World Tech Centre, 95 How Ming Street, Kwun Tong, Kowloon, Hong Kong.

Cotton Breeze International, 13/1578 Govindpuri, New Delhi, India.

Hanin Garment Factory, 31 Tai Yau Street, Kowloon, Hong Kong.

Hip Hing Thread Company, No. 10, 6/F Building A, 221 Texaco Road, Waikai Industrial Centre, Tsuen Wan, N.T. Hong Kong.

Hyattex Industrial Company, 3F, No. 207–4 Hsin Shu road, Hsin Chuang City, Taipei Hsien, Taiwan.

Jentex Industrial, 7–1 Fl., No. 246, Chang An E. Rd.,Sec. 2, Taipei, Taiwan.

Li Xing Garment Company Limited, 2/F Long Guang Building, Number 2 Manufacturing District, Sanxiang Town, Zhongshan, Guandgong, China.

Meigao Jamaica Company Limited, 134 Pineapple Ave., Kingston, Jamaica.

Meiya Garment Manufacturers Limited, No. 2 Building, 3/F, Shantou Special Economic Zone, Shantou, China.

Poshak International, H–83 South Extension, Part–I (Back Side), New Delhi, India.

Topstyle Limited, 6/F, South Block, Kwai Shun Industrial Center, 51–63 Container Port Road, Kwai Chung, New Territories, Hong Kong.

United Fashions, C–7 Rajouri Garden, New Delhi, India.

Yunnan Provincial Textiles Import & Export, 576 Beijing Road Kunming, Yun Nan, China.

Any of the above parties may petition to have its name removed from the list. Such petitions, to include any documentation that the petitioner deems pertinent to the petition, should be forwarded to the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1301 Constitution Avenue, Washington, D.C. 20229.

ADDITIONAL FOREIGN ENTITIES

In the October 1996 Federal Register notice, Customs also solicited information regarding the whereabouts of 38 foreign entities, which were identified by name and known address, concerning alleged violations of § 592. Persons with knowledge of the whereabouts of those 38 entities were requested to contact the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1301 Constitution Avenue, Washington, D.C. 20229.

In this document, a new list is being published which contains the names and last known addresses of 40 entities. This reflects the addition of two new entities to the list.

Customs is soliciting information regarding the whereabouts of the following 40 foreign entities concerning alleged violations of § 592. Their name and last known address are listed below:

Bahadur International, 250 Naraw Industrial Area, New Delhi, India.

Madan Exports, E–106 Krishna Nagar, New Delhi, India.

Gulnar Fashion Export, 14 Hari Nagar, Ashram, New Delhi, India.

Janardhan Exports, E–106 Krishna Nagar, New Delhi, India.

Morrin International, E–106 Krishna Nagar, New Delhi, India.

Jai Arjun Mfg., Co., B 4/40 Paschim Vihar, New Delhi, India.

Eroz Fashions, 535 Tuglakabad Extension, New Delhi, India.

China Artex Corp. Beijing Arts, 132–16 Changan Avenue, Beijing, China.

Shenzhen Long Gang Ji Chuen, Shenzhen, Long Gang Zhen, China.

Traffic, D1/180 Lajpat Nagar, New Delhi, India.

Raj Connections, E–106 Krishna Nagar, Delhi, India.

Bao An Wing Shing Garment Factory, Ado Shi Qu, Bao An Shen Zhen, China.

Guidetex Garment Factory, 12 Qian Jin Dong Jie, Yao Tai Xian Yuan Li, Canton, China.

Dechang Garment Factory, Shantou S.E.Z., Cheng Hai, Cheng Shing, China.

Guangdong Provincial Improved, 60 Ren Min Road, Guangdong, China.

Kin Cheong Garment Factory, No. 13 Shantan Street, Sikou Country, Taishan, Kwangtong, China.

Gold Tube Ltd., No. 55 Hung To Road, Kwun Tong, Kowloon, Hong Kong.

Sam Hing Bags Factory, Ltd., #35 Tai Ping West Road, Jiu Jaing, Ghangdong, China.

Luen Kong Handbag Factory, 33 Nanyuan Road, Shenzhen, Guangdong, China.

Changping High Stage Knitting, Yuan Jing Yuan, Chau Li Qu Chang, Guangdong, China.

Arsian Company Ltd, XII Khorcolo, Waanbaatar, Mongolia.

Kin Fung Knitting Factory, Block A&B, 4th Flr Por Mee Bldg., 500 Casle Peak Rd., Kowloon, Hong Kong.

Cahaya Suria Sdn Bhd, Lot 5, Jalan 3, Kedah, Malaysia.

Crown Garments Factory Sdn Bhd, Lot 112, Jalan Kencana, Bagan Ajam, Malaysia.

Glee Dragon Garment Mfg.. Ltd., 328 Castle Peak Rd., Room G 10Fl, Tsuen Kam Centre, Kowloon, Hong Kong.

Richman Garment Manufacturing Co., Ltd., 7th Fl, Singapore Industrial Bldg., 338 Kwun Tong Road, Kowloon, Hong Kong.

Herrel Company, 64 Rowell Road, Suva, Fiji.

Belwear Co., Ltd., Flat C, 3rd Floor, Yuk Yat Street, Kowloon, Hong Kong.

Hambridge Ltd., 9 Fl., Lladro Building 72–80, Hoi Yuen Road, Kwun Tong, Kowloon, Hong Kong.

Kingston Garment Ltd., Lot 42–44 Caracas Dr., Kingston, Jamaica.

Moderntex International Inc., 3941, Kowloon, Hong Kong.

Poltex Sdn, 8 Jalan Serdang, Kedah, Malaysia.

Sam Hing International Enterprise, 5 Guernsey St., Guilford NSW, Australia.

Societe Prospere De Vetements S.A., Lome, Togo.

Confecciones Kalinda S.A., Zona Franca, Los Alcarrizos, Santo Domingo, Dominican Republic.

Royal Mandarin Knitworks Co., Flat C 21/F, So Tau Centre, 11–15 Sau Road, Kwai Chung, N.T., Hong Kong.

Wong's International, Nairamdliyn 26, Ulaanbaatar 11, Naaun, Mongolia.

Lin Fashions S.A., Lot 111, San Pedro de Macoris, Dominican Republic.

Samsung Corporation, CPO Box 1144, Seoul, Korea.

United Textile and Weaving, P.O. Box 40355, Sharjah, United Arab Emirates.

If you have any information as to a correct mailing address for any of the above 40 firms, please send that information to the Assistant Commissioner, Office of Field Operations, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

Dated: March 27, 1997.

AUDREY ADAMS,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, April 1, 1997 (62 FR 15563)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 1, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

TERMINATION OF ELECTRONIC BULLETIN BOARD POSTING OF COUNTRY OF ORIGIN RULINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Country of origin rulings will no longer be posted on the Customs Electronic Bulletin Board (CEBB).

SUMMARY: This notice advises interested parties that as of May 1, 1997, Customs will terminate posting country of origin rulings on the CEBB, in File Area #5, which is titled "Proposed or Final Rulings".

EFFECTIVE DATE: May 1, 1997.

ADDRESS: Any inquiries are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This notice advises interested parties that as of May 1, 1997, Customs is terminating the posing of country of origin rulings on the CEBB in File Area #5, which is titled "Proposed or Final Rulings". Thus, as of May 1, 1997, all country of origin rulings will be placed, as are other Customs rulings, on the World Wide Web. Customs address on the World Wide Web is: www.customs.ustreas.gov

Dated: March 31, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 1, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF CUSTOMS DECISIONS RELATING TO TARIFF CLASSIFICATION OF AUTOMOBILE WIRING HARNESSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two decisions and clarifying another relating to the tariff classification of automobile wiring harnesses. These articles are assemblies of insulated electric wires with a variety of electrical devices attached. Notice of the proposed revocations and clarification was published on February 19, 1997, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 16, 1997.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 19, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 8, proposing to revoke *HQ* 088477, dated May 9, 1991, and *HQ* 956893, dated January 19, 1995, which classified an automobile wiring harness assembly and an electro-mechanical crash sensor, respectively, as other parts and accessories of motor vehicles, in subheading 8708.99.50 (now 80), Harmonized Tariff Schedule of the United States (HTSUS), and to clarify *HQ* 958653, dated April 15,

1996, which classified an automobile window regulator harness with power switch, among other wiring harnesses, as a wiring set of a kind used in vehicles, in subheading 8543.30.00, HTSUS. One comment was received in response to this notice. The commenter agrees with the conclusion in *HQ* 958653 but disagrees with the legal rationale. In *HQ* 958653, it was held that the wiring harness assembly in issue was a composite machine containing two or more apparatus of Chapter 85 that perform complementary or alternative functions, but that a principal function could not be determined. Under General Interpretative Rule (GRI) 3(c), HTSUS, the good was held to be provided for in heading 8544, the heading occurring last in numerical order among those which equally merit consideration. The commenter maintains that the wiring harness with door lock and window power switch is classifiable according to GRI 1 because its function in distributing electricity to various automotive components is described by heading 8433. We agree that GRI 1 is the basis for classifying this goods; however, because the power switch attached to the wiring harness is not a connector, we disagree that heading 8544 describes the wiring harness assembly *prima facie*.

Alternatively, the commenter maintains the wiring harness assembly is provided for in subheading 8544.30.00 as a wiring set of a kind used in vehicles, because under Section XVI, Note 3, HTSUS, its principal function is to distribute electricity. We agree as to the classification. However, because of the equally significant functions the switch and the wiring harness perform, neither of which can be said to prevail over the other, we remain of the opinion that a principal function in this case cannot be determined. The commenter suggests that to aid us in determining principal function, the concept of essential character, found in GRI 3(b), HTSUS, be applied, and posits a hypothetical example involving large wiring harnesses with over 230 circuits and numerous incorporated electrical apparatus, to illustrate why Customs conclusion as to principal function is impractical. We find these suggestions to be inapposite, both as to the legal principals involved and to the facts of the particular wiring harness in issue. We find further that the several administrative rulings which the commenter cites, that involve wiring harnesses with light bulbs attached, were decided in the context of the particular facts in those cases. As such, they are of limited probative value here.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking *HQ* 088477 and *HQ* 956893 and clarifying *HQ* 956653 to reflect the proper classification of the automobile wiring harnesses described therein in subheading 8544.30.00, HTSUS, a provision for other wiring sets or a kind used in vehicles. The rate of duty under this provision is 5 percent *ad valorem*. *HQ* 960148 revoking *HQ*

088477, *HQ* 959988 revoking *HQ* 956893, and *HQ* 960190 clarifying *HQ* 958653 are set forth as the Attachments to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 26, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 26, 1997.
CLA–2 RR:TC:MM 960148 JAS
Category: Classification
Tariff No. 8544.30.00

MR. KEVIN SMITH
CUSTOMS ADMINISTRATOR
GENERAL MOTORS CORPORATION
3044 West Grand Boulevard, Rm. 14–262C
Detroit, MI 48202

Re: *HQ* 088477 Revoked; automobile wiring harness assemblies; assembly of wires and fuses, lamp sockets with lamps, monitor module with microprocessor, connectors and other electrical devices; parts and accessories of motor vehicles, Heading 8708; Section XVII, Note 2(f); insulated electric conductors, wires fitted with connectors, Heading 8544; composite machine, principal function, section XVI, Note 3.

DEAR MR. SMITH:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623, of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *HQ* 088477 was published on February 19, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 8.

Facts:

The wiring harness assembly in *HQ* 089477 consisted of a number of insulated wires wound together, to which were attached a fuse box with fuses, courtesy lamp socket with lamp, lamp monitor module with microprocessor, door ajar module, glove box switch with lamp and socket, "check engine light driver module" and "convenience center" consisting of relays and a circuit breaker for the air conditioner blower fan and headlights.

The provisions under consideration are as follows:

8512	Electrical lighting or signaling equipment * * *, of a kind used for motor vehicles; parts thereof:
8512.20	Other lighting or visual signaling equipment:
8512.20.20	Lighting equipment
* * * * * * *	
8536	Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V:

8536.10.00	Fuses
8526.50	Other switches:
8536.50.80	Other
* * * * * * *	
8544	Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; * * *:
8544.30.00	Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships
* * * * * * *	
8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:
8708.99	Other:
8708.99.80	Other

Issue:

Whether automobile wiring harnesses, as described, are goods of heading 8544.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Articles of Section XVII, which includes heading 8708, are excluded from Section XVI, which includes heading 8544, **Section XVI, Note 1 (1), HTSUS.** For purposes of heading 8708, the expression ***"parts"*** and ***"parts and accessories"*** do not apply to electrical machinery or equipment (Chapter 85). **Section XVII, Note 2(f), HTSUS.** Therefore, if the wiring harnesses are goods of heading 8544, or any other heading in Chapter 85, they cannot be classified in heading 8708.

Relevant **ENs,** at p. 1404, state in part that heading 85.44 covers insulated electric wire, cable and other conductors (e.g., braids, strip, bars) used as conductors in electrical machinery, apparatus or instruments. Such wires and cables remain in heading 85.44 even if cut to length or fitted with connectors (e.g., plugs, sockets, lugs, jacks, sleeves or terminals) at one or both ends. In addition to connectors, the wiring harness assemblies in issue are fitted, among other things, with lamp sockets with lamps (heading 8512), with lamp monitor module and microprocessor which is electrical lighting or signaling equipment (heading 6512), and with switches (heading 8536). Because these wiring harness assemblies contain electrical devices or apparatus in addition to connectors, they are not goods of heading 8544 by virtue of GRI 1.

However, section XVI, note 3, HTSUS, provides, in relevant part, that composite machines and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. In accordance with the **General Explanatory Notes** to Section XVI, at p. 1133, where it is not possible to determine the principal function, and where the context does not require otherwise, it is necessary to apply General Interpretative Rule 3(c) which requires classification in the heading which occurs last in numerical order among those which equality merit consideration.

This merchandise is a composite machine under Section XVI, Note 3, HTSUS. In this case, the lamp sockets and lamps perform an illuminating function within the car for passenger comfort and convenience, while the lamp monitor nodule with microprocessor performs an electrical sound or signaling function that alerts to electrical irregularities and low fluid levels. These functions are significant. Nevertheless, it is the wiring harness which conducts electrical current to these various apparatus and transmits the signals they produce. This is a function that in our opinion is equally significant. For this reason,

we conclude that in this case a principal function cannot be determined. Therefore, the merchandise is provided for in heading 8544, as insulated electric conductors, because this is the heading which occurs last in numerical order among those which equally merit consideration. Therefore, heading 8708 is eliminated from consideration.

Holding:

Under the authority of GRI 1, the automobile wiring harness assemblies in issue are provided for in heading 8544. They are classifiable in subheading 8544.30.00, HTSUS. *HQ* 088477, dated May 9, 1991, is revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 26, 1997.

CLA–2 RR:TC:MM 959988 JAS
Category: Classification
Tariff No. 8544.30.00

SCOTT E. ROSENOW, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W., Suite 807
Washington, DC 20036–5605

Re: *HQ* 956893 Revoked; airbag sensors; electro-mechanical crash sensor; composite machine consisting of pressure sensor, wiring harness and bracket; Section XVI, Note 3, principal function; automotive parts and accessories: Section XVII, Note (f); *NY* 840600.

DEAR MR. ROSENOW:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2166 (1993), notice of the proposed revocation of *HQ* 956893 was published on February 19, 1997, the CUSTOMS BULLETIN, Volume 31, Number 8.

Facts:

The merchandise in *HQ* 956893 consisted of a series of intertwined insulated electrical wires or wiring harness with a plastic connector on one end. On the other end was a sensor unit in a metal housing with a metal bracket attached. In operation, when a motor vehicle collides with another object, the sensor "senses" changes in deceleration and when a predetermined value is reached two contacts close, thus connecting an electric circuit. This allows current to flow through the harness to an inflator which is mechanical apparatus that inflates the airbag. The inflator is not in issue here.

The provisions under consideration are as follows:

8536	Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V:
8536.50	Other switches;
8536.50.80	Other

*	*	*	*	*	*	*	
8544	Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; * * *:						
8544.30.00		Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships					
*	*	*	*	*	*	*	
8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:						
8708.99		Other:					
8708.99.80			Other				

Issue:

Whether an electro-mechanical crash sensor, as described, is a good of heading 8544.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Articles of Section XVII, which includes heading 8708, are excluded from Section XVI, which includes heading 8544. **Section XVI, Note 1(1), HTSUS.** For purposes of heading 8708, the expression ***"parts"*** and ***"parts and accessories"*** do not apply to electrical machinery or equipment (Chapter 85). **Section XVII, Note 2(f), HTSUS.** Therefore, if the crash sensor is a good of heading 8544, or any other heading in Chapter 85, it cannot be classified in heading 8708.

Relevant **ENs,** at p. 1404, state in part that heading 85.44 covers insulated electric wire, cable and other conductors (e.g., braids, strip, bars) used as conductors in electrical machinery, apparatus or instruments. Such wires and cables remain in heading 85.44 even if cut to length or fitted with connectors (e.g., plugs, sockets, lugs, jacks, sleeves or terminals) at one or both ends. In addition to a plastic connector, the wiring harness in issue here is fitted with a sensor switch of a type provided for in heading 8536. Because this wiring harness assembly contains an electrical device or apparatus in addition to connectors, it is not a good of heading 8544 by virtue of GRI 1.

Section XVI, Note 3, HTSUS, provides, in relevant part, that composite machines and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. In accordance with the **General Explanatory Notes** to Section XVI, at p. 1133, where it is not possible to determine the principal function, and where the context does not require otherwise, it is necessary to apply General Interpretative Rule 3(c), which requires classification in the heading which occurs last in numerical order among those which equally merit consideration.

In our opinion, the crash sensor in issue is a composite machine. It contains two or more apparatus of Chapter 85 that perform complementary or alternative functions. The wiring harness is provided for in heading 8544 and the "sensor," which is actually a pressure or inertia switch, is provided for in heading 8536. In this regard, inertia switches are those capable of sensing acceleration, shock or vibration. However, there is no measuring or sensing mechanism within the switch, hence it performs no such discreet sensing function. When an increase or decrease in velocity is reached, the two metal contacts close and the circuit connects. This is the function of a switch. *See NY* 840600, dated May 24, 1989. In this case, the sensor switch creates an electrical impulse in an automobile crash condition which is a significant, perhaps even safety-critical function. Nevertheless, it is the wiring harness which transmits that impulse to the airbag deployment device. This is a function that in our opinion is equally significant. For this reason, we conclude that in this case a principal function cannot be determined. Accordingly, the merchandise is provided for in

heading 8544, as insulated electric conductors, because this is the heading which occurs last in numerical order among those which equally merit consideration. Therefore, heading 8708 is eliminated from consideration.

Holding:

Under the authority of GRI 1, the electro-mechanical crash sensor in issue is provided for in heading 8544. It is classifiable in subheading 8544.30.00, HTSUS. *HQ* 956893, dated January 19, 1995, is revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 26, 1997.

CLA–2 RR:TC:MM 960190 JAS
Category: Classification
Tariff No. 8544.30.00

DAVID P. SANDERS, ESQ.
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009–5729

Re: *HQ* 958653 Clarified; electrical wiring harnesses, electrical apparatus used as conductors in automotive applications, apparatus for supplying electricity to working parts of automotive vehicles, Heading 8544; wiring harness with power window and door lock switch; parts and accessories of motor vehicles, Heading 8708, Section XVII, Note 2(f); composite machine, principal function, Section XVI, Note 3.

DEAR MR. SANDERS:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed clarification of *HQ* 958653 was published on February 19, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 8.

Facts:

The merchandise in *HQ* 958653 consisted of five (5) wiring harness assemblies, all of which are used in electrical distribution systems of automotive vehicles. These wiring harnesses all have the following common components: copper wires (circuits), metal terminals, plastic connectors, plastic and/or cloth tape, plastic protective tubing, and plastic locating devices or clips for securing the harness to the vehicle ("common components"). The copper wires are used incidentally for grounding but primarily for electrical supply. The low gauge copper wires are used to transmit electrical signals for information while the higher gauge wires carry electricity for power.

Model F5DB–9D930–AA is a harness containing thirteen wires and common components listed above, to include metal terminals, plastic connectors, electrical tape, plastic protective tubing, and plastic locating device. This harness conducts electricity between an engine control module and six fuel injectors.

Model F5TB–13412–AA is a 6-wire electrical conductor for a rear license plate light. It contains the common components listed above, plus two sockets for light bulbs, but minus the bulbs.

Model F5LB–12A522–AA incorporates 78 wires but contains nothing other than the common components listed above, but no light socket. This is the circuitry for most of a car's engine control elements (sensors, fuel injectors, ignition control, air conditioning, clutch coil control, idle speed control, exhaust gas recirculation solenoid control, alternator and battery, oil pressure sensor, water temperature control, radio noise suppression, and some steering components. This harness functions only to transmit electricity. It neither performs nor assists any engine control function.

Model F5TB–12A581–GN is a 199-circuit engine control harness which, in addition to the common components listed above, contains a power distribution box into which fuses, relays, and diodes are plugged, and an independent resistor/diode welded to a wire. Among its connectors are eight light sockets, without bulbs, for parking lights, turn signals and headlamps, and test connection points for a diagnostic computer used by repair technicians. It does not incorporate any of the engine control elements nor does it assist in their functions other than carrying electricity to them.

Model F5TB–14A265–AA is a 21-circuit, electric door-lock and window regulator harness containing the common components listed above, plus a power switch that enables passengers to lock and unlock doors, and raise and lower power windows. This harness supplies power to the window and door-lock motors, as well as to the right front door courtesy lamp and right door stereo speaker.

Customs officers in Laredo acceded to your contention that notwithstanding the presence of power distribution or fuse boxes, light sockets, switches, etc., four of the five wiring harnesses functioned primarily as insulated electric conductors of the type described in heading 8544, Harmonized Tariff Schedule of the United States (HTSUS). However they raised the question whether the power switch on the fifth model that locks/unlocks doors and raises/lowers power windows precludes classification as an insulated electrical conductor.

The provisions under consideration are as follows:

8544	Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors: * * *;
8544.30.00	Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships
* * * * * * *	
8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:
8708.99	Other:
8708.99.90	Other * * * 2.9 percent *ad valorem*

Issue:

Whether an automobile wiring harness with door-lock and power window switch is a good of heading 8544.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1969).

Articles of Section XVII, which includes heading 8708, are excluded from Section XVI, which includes heading 8544. **Section XVI, Note 1(1), HTSUS.** For purposes of heading 8706, the expression ***"parts"*** and ***"parts and accessories"*** do not apply to electrical machinery or equipment (Chapter 85). **Section XVII, Note 2(f), HTSUS.** Therefore, if the fifth wiring harness is a good of heading 8544, or any other heading in Chapter 85, it cannot be classified in heading 8708.

Relevant **ENs,** at p. 1404, state in part that heading 85.44 covers insulated electric wire, cable and other conductors (e.g., braids, strip, bars) used as conductors in electrical ma-

chinery, apparatus or instruments. Such wires and cables remain in heading 85.44 even if cut to length or fitted with connectors (e.g., plugs, sockets, lugs, jacks, sleeves or terminals) at one or both ends. The fifth wiring harness assembly is fitted with a switch of heading 8536. Because this wiring harness contains an electrical device or apparatus in addition to connectors, it is not a good of heading 8544 by virtue of GRI 1.

Section XVI, Note 3, HTSUS, provides in relevant part that composite machines and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. In accordance with the **General Explanatory Notes** to Section XVI, at p. 1133, where it is not possible to determine the principal function, and where the context does not require otherwise, it is necessary to apply General Interpretative Rule 3(c), which requires classification in the heading which occurs last in numerical order among those which equally merit consideration.

In our opinion, the fifth wiring harness assembly is a composite machine. It contains two or more apparatus of Chapter 85 that perform complementary or alternative functions. The wire harness is provided for in heading 8544 and the switch is provided for in heading 8536. In this case, the switch opens and closes a circuit which allows the windows to raise and lower and the doors to lock and unlock. This is a significant function both for safety reasons and for reasons of passenger convenience or comfort. Nevertheless, it is the wiring harness which transmits the electrical current to the motors that permits the switch to operate. The harness also supplies power to other automotive components within the car. This is a function that in our opinion is equally significant. For this reason, we conclude that in this case a principal function cannot be determined. Accordingly, the merchandise is provided for in heading 8544, as insulated electric conductors, because this is the heading which occurs last in numerical order among those which equally merit consideration. Therefore, heading 8708 is eliminated from consideration.

Holding:

Under the authority of GRI 1, the fifth automobile wiring harness assembly is provided for in heading 8544. It is classifiable in subheading 8544.30.00, HTSUS. *HQ* 958653, dated April 15, 1996, is clarified, but in otherwise affirmed.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELASTIC PONYTAIL HOLDERS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying ruling A84851, dated July 12, 1996, concerning the tariff classification of elastic ponytail holders. Notice of the proposed modification was published on February 19, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 8.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 16, 1997.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Tariff Classification Appeals Division (202) 482–6996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 19, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 8, a notice of a proposal to modify ruling A84851, which classified ponytail holders under subheading 5609.00.3000, HTSUS. The proper classification of the ponytail holder is under 5609.00.4000, HTSUS.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs is modifying A84851, dated July 12, 1996. Headquarters Ruling Letter 959968 modifying A84851 is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 31, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 31, 1997.

CLA–2:RR:TC:TE 959968 RH
Category: Classification
Tariff No. 5609.00.4000

MR. JEFFREY A. MEEKS
MEEKS & SHEPPARD
330 Madison Avenue
New York, NY 10017

Re: Modification of NY A84851; Elastic ponytail holders; subheading 5609.00.3000; subheading 5609.00.4000.

DEAR MR. MEEKS:

On July 12, 1996, Customs issued New York Ruling Letter (NY) A84851 to you in response to a request submitted by you on behalf of L & N Sales and Marketing Inc., regarding sixteen samples of various styles of ponytail holders.

In that ruling, all of the ponytail holders except style number 14553 were classified under subheading 5609.00.3000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Style number 14553 was classified under subheading 5609.00.4000, HTSUSA.

Our New York office asked us to review NY A84851 and modify the ruling to reflect classification of all the ponytail holders under subheading 5609.00.4000.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed modification of A84851 was published on February 19, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 8.

Facts:

In NY A84851 the ponytail holders are described as follows:

> Styles 13913, 13915, 13998, 14202, 14550, 14551, 14554, and 14555 all have tightly braided man-made fiber outer covering over the rubber core, and differ only in size and color. Style 14540 fits the same description, except that the rubber core deviates from the center at intervals, creating a buckling effect. Styles 14279 and 14283 also have braided man-made fiber outer coverings, which have a different appearance from the other items because the braid is looser and is made with bulkier yarns.
>
> Style 14553 has a rubber core with a tightly braided outer covering of man-made fiber and fine metalized strips.
>
> Styles "A" and "B" consist of four cords twisted together and joined to form a circular loop; each of the four cords consists of a tightly braided outer covering of man-made fiber over a rubber core.
>
> Style "C" has a core which consists of a tightly braided man-made fiber/rubber core similar to the items in the first group above, around which is tied, at ½ inch intervals, a set of three braided man-made fiber cords.
>
> Style 14274 consists of a rubber core wrapped with combed untwisted man-made fiber, held in place by a man-made fiber yarn to create a decorative spiral effect.

Issue:

Whether the ponytail holders are classifiable as cordage of man-made fibers under subheading 5609.00.3000, or as cordage of other materials under subheading 5609.00.4000?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs), GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Heading 5609 covers "Articles of yarn, strip or the like of heading 5404 or 5405, twine, cordage, rope or cables, not elsewhere specified or included."

Note 10 to Section XI states: "Elastic products consisting of textile materials combined with rubber threads are classified in this Section."

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), while not legally binding, are recognized as the official interpretation of the Harmonized System at the international level. The EN to heading 5609 state that the heading includes:

> [Y]arns, cordage, rope, etc. cut to length and looped at one or both ends, or fitted with tags, rings, hooks, etc., (e.g., shoe laces, clothes lines, towing ropes), ships' fenders, unloading cushions, rope ladders, loading slings, dish "cloths" made of a bundle of yarns folded in two and bound together at the folded end, etc.

In this case, both ends of each of the samples submitted are held together with metal clamps, which meets the definition of the EN. Accordingly, they are classifiable under heading 5609.

Holding:

The ponytail holders are classifiable under subheading 5609.00.4000. HTSUSA, which provides for "Articles of yarn, strip or the like of heading 5404 or 5405, twine, cordage, rope or cables, not elsewhere specified or included: Other." They are dutiable at the general rate of 6.6 percent *ad valorem*.

In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1). Customs Regulations (19 CFR 177.0(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–34)

THK AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00350

Plaintiff challenges the United States Customs Service's ("Customs") classification of its import linear motion guides ("LMGs") as other ball bearings under 8482.10.50 of the Harmonized Tariff Schedule of the United States ("HTSUS") and its import LMG parts as other ball bearing parts under HTSUS 8482.99.10. Plaintiff contends its imports are properly classified as other housed bearings under HTSUS 8483.20.80 and as parts of bearing housings under HTSUS 8483.90.30 or, in the alternative, as ball bearings with integral shafts under HTSUS 8482.10.10. Customs counterclaims that certain parts of THK LMGs were improperly classified upon importation as other machinery parts under HTSUS 8485.90.00 but are properly classified as other ball bearing parts under HTSUS 8482.99.10.

Held: Plaintiff's LMGs and LMG parts, including those parts at issue in Customs' counterclaim, are properly classified as other ball bearings under HTSUS 8482.10.50 and other ball bearing parts under HTSUS 8482.99.10.

[Judgment for defendant. Case dismissed.]

(Dated March 26, 1997)

Sonnenberg & Anderson (Steven P. Sonnenberg and *Jacqueline M. Paez)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis,* Senior Trial Attorney) for defendant.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, THK America, Inc. ("THK"), challenges the United States Customs Service's ("Customs") classification of its import linear motion guides ("LMGs") as other ball bearings under 8482.10.50 of the Harmonized Tariff Schedule of the United States ("HTSUS") and its import LMG parts as other ball bearing parts under HTSUS 8482.99.10. THK contends its imports are properly classified as housed bearings under HTSUS 8483.20.80 and as parts of bearing housings under HTSUS 8483.90.30 or, in the alternative, as ball bearings with integral shafts under HTSUS 8482.10.10. Customs counterclaims that certain parts of LMGs were improperly classified upon

importation under HTSUS 8485.90.00. The Court has jurisdiction over this matter under 28 U.S.C. § 1581(a), 28 U.S.C. § 1583 and 19 U.S.C. § 1514(a).

BACKGROUND

THK's LMGs consist of two main components, one or more steel blocks and a matching "T-shaped" rail. Each block contains four rows of circulating steel balls, a retainer, plastic end plates, rubber seals and a grease nipple, and moves in a linear fashion along the rail while supporting a load. The rail, which has four longitudinal grooves ground along its upper portion, varies in length depending on the LMG's intended application. Mounting holes are drilled into the LMG blocks and the LMG rail.

In *THK America, Inc. v. United States*, 17 CIT 1169, 837 F. Supp. 427 (1993), the Court concluded that THK's LMGs were properly classified as other ball bearings under HTSUS 8482.10.50, and not, as THK contended, as other machinery parts under HTSUS 8485.90.00. Upon determining that there was no clear Congressional intent as to the meaning of the tariff term ball bearing, the Court had to construe the term according to its current common and commercial meaning. *See id.* at 1174, 837 F. Supp. at 432. The Court therefore consulted the American National Standard AFBMA Standard Terminology for Antifriction Bearings and Parts, THK's own pre-1986 catalogs and advertisements, and the relevant HTSUS Explanatory Note, concluding that the tariff term ball bearing was meant to include THK's LMGs. *Id.*

THK concedes that the Court's decision was technically correct with the evidence presented at the previous trial. However, THK now advances an entirely new claim, contending that it has become aware of certain technical points mandating a different result. In particular, THK claims that because its LMGs are "preloaded," they are not ball bearings but, instead, have the structure and function of housed bearings. Trial was held on this issue on October 29, 1996. At trial, THK voluntarily dismissed its alternative cause of action, which alleged its LMGs were properly classified as ball bearings with integral shafts. Tr. 4.

Customs classified the LMGs at issue as other ball bearings and parts thereof under the following HTSUS heading:

8482	Ball or roller bearings, and parts thereof:	
8482.10	Ball bearings:	
* * * * * * *		
8482.10.50	*Other*	*11%*
* * * * * * *		
8482.99	Other:	
8482.99.10	*Parts of ball bearings*	*11%*

THK contends that this classification is incorrect and alleges the LMGs are properly classified as housed bearings and parts thereof under the following HTSUS heading:

8483			Transmission shafts (including camshafts and crankshafts) and cranks; bearing housings; housed bearings and plain shaft bearings; * * *; parts thereof:			
*	*	*	*	*	*	*
8483.20			Housed bearings, incorporating ball or roller bearings:			
*	*	*	*	*	*	*
8483.20.80			*Other*			*5.7%*
*	*	*	*	*	*	*
8483.90			Parts:			
*	*	*	*	*	*	*
8483.90.10			* * * Parts of bearing housings and plain shaft bearings:			
*	*	*	*	*	*	*
8483.90.30			*Other*			*5.7%*

DISCUSSION

Pursuant to 28 U.S.C. § 2639(a)(1) (1994), Customs' tariff classifications are presumed correct and the burden of proving that the assigned classification is erroneous is on the challenging party. *See, e.g., Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). To determine whether the challenging party has overcome the statutory presumption of correctness, the Court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

In the absence of legislative intent or a proven commercial definition of a tariff term, the Court must construe a tariff term in accordance with its common and commercial meaning. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992). In determining such a meaning, the Court may rely on its own understanding of the term and consult lexicographic and scientific authorities, as well as other reliable sources, including the testimony of expert witnesses. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir.), *cert. denied*, 488 U.S. 943 (1988). Expert witness testimony "may properly be considered simply as advisory and as aiding the memory and understanding of the court, and it is not binding and may be accepted or rejected as appears proper." *Marubeni Am. Corp. v. United States*, 20 CIT ____, ____, 915 F. Supp. 413, 417 (1996) (citing *Tropical Craft Corp. v. United States*, 45 CCPA 59, C.A.D. 673, 1958 WL 7363 (1958)).

THK contends its LMGs are housed units containing ball bearings that are designed for accurate positioning through optimized friction and rigidity created by preloading. According to the testimony of Dr. Ali

A. Seireg, an expert in machine design, lubrication and all types of bearings, a typical ball bearing, which is a type of antifriction bearing, is designed with clearance and is not preloaded.[1] *See* Tr. 34–37. Because of the ball bearing structure, its function is to *minimize* friction by rolling along tracks carrying loads and guiding motion. Tr. 40. In contrast, LMGs are not *anti*friction bearings but, rather, *generate* friction for control and positioning through preloading. Tr. 33–34, 40–41. Indeed, Dr. Seireg testified that preloading the LMG, particularly with its gothic arc construction, causes the balls to actually slide, drastically increasing friction. Tr. 41–42. Hence, Dr. Seireg maintains, the pressure created by preloading the LMGs produces the friction and rigidity necessary for precise positioning control, as well as the repeatability of accurate positioning. *See* Tr. 40–43. Ball bearings cannot achieve this precise positioning and repeatability because they have clearance. Tr. 40–43.

Dr. Seireg concedes that all types of ball bearings may be preloaded. Tr. 66–68. Nevertheless, once preloading occurs, the function of the bearing changes and such bearings are no longer *ball* bearings, but preloaded bearings. *See* Tr. 70. Hence, Dr. Seireg asserts, a preloaded LMG could be referred to properly as a linear motion ball bearing *unit* or *system*, but not simply as a ball bearing. Tr. 32, 69–70.

THK claims this new evidence regarding preloading precludes classification of LMGs as ball bearings and the LMGs' structure and function compels their classification as housed bearings. With respect to the characteristics of housed bearings, Dr. Seireg testified that housed bearings are structured to: (1) support the bearing elements and protect them from the environment; (2) attach the bearing to a machine; and (3) enclose the lubricant. *See* Tr. 43–46. Dr. Seireg states that the block, railing, end plates and seals operate as a housing, as they combine to support and protect the bearing elements while enclosing the lubricant. Tr. 46. Further, the LMG is manufactured with the capability of mounting both the rail and block to a machine. *See* Tr. 45.

Defendant responds that, despite preloading, LMGs are indeed antifriction devices. According to the testimony of David D. Gridley, Executive Director of Marketing Services and Government Affairs for The Torrington Company and an expert in the marketing and selling of bearings, preloading is merely an application-specific choice and has no effect on an item's status as a bearing; precise positioning bearings can still be antifriction bearings if the bearing rolls on balls as opposed to sliding along surfaces. Tr. 87, 94. These ball-rolling elements distinguish LMGs from true "slide bearings," which have two races that rub and no balls. Tr. 93–95.

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[1] For purposes of this opinion, preloading is the tightening of clearance by increasing the ball size in relation to the inner race and outer race, thereby simulating the pressure of a load. Tr. 86, 121. Clearance is the area between the ball and the space allocated for that ball that permits the free rotation of bearings by allowing a lubricating film to develop for the protection of bearing life and accommodating any changes in thermal expansion. Tr. 35. A preloaded bearing has no clearance and the pressure from the tightening produces a slight deformation of the rolling element, the ball. *See* Tr. 37–38, 87.

John C. Bandrowski, Chief Applications Engineer for Thompson Industries and an expert in housed bearings and linear motion guides, also disagrees with Dr. Seireg's assertion that LMGs are not antifriction bearings. Tr. 120–22. Mr. Bandrowski first notes that ball bearings are complete antifriction devices consisting of an outer ring, an inner ring and balls. Tr. 117–18. THK's LMGs satisfy this description since the balls are contained in the block, which functions as the outer race, while the rail that the block travels along provides the inner race. Tr. 117–18.

Mr. Bandrowski also refutes Dr. Seireg's testimony regarding preloading, contending that when a preloaded LMG is attached to a machine and carries an application load, the top balls shoulder more of the load and the lower balls come out of preload, allowing the LMG to ride smoothly along the races with low friction. Tr. 122. Therefore, while the LMG remains stiff to effect an accuracy specification, it operates properly by *reducing* friction. Tr. 123. Further, Mr. Bandrowski testified that, while preloading creates stiffness, which is necessary for accuracy, an actuation device is usually responsible for precise positioning. *See* Tr. 123–26.

Customs further argues that, structurally, LMGs are not housed bearings. According to the testimony of both Mr. Gridley and Mr. Bandrowski, there are several reasons why LMGs are distinct from housed bearings. First, housed bearings are typically comprised of *separate* commercial articles, a bearing housing and a bearing. *See* Tr. 84–85, 95–97, 131. In Mr. Gridley's experience, the term housed bearing is not used in the industry to denote shafts or rails but, rather, removable pillow blocks or mounted units enclosing a separate bearing. Tr. 97.[2] Further, housings are typically made of soft, inexpensive material such as cast iron, while the LMG casing is made of hardened steel to adequately accommodate the steel balls that run directly on the casing. Tr. 98, 135. In addition, because the housed bearing housing is separate from the enclosed balls, the two parts are independently replaceable, while the entire LMG unit must be replaced in cases of failure. Tr. 103, 130. Finally, housings merely hold the balls, and so, are not important for "load and life" calculations, which constitute vital consumer information regarding the use and durability of a bearing and are computed by measuring the balls, inner race and outer race. Tr. 98–102, 138–40. In contrast, the LMG block and rail are both important for calculating load and life because they contain the balls, as well as the outer and inner races. Tr. 99.

Customs bolsters its argument by referring to THK's own LMG descriptions in pre-1986 catalogs and advertisements and U.S. patents, as well as certain HTSUS Explanatory Notes. In its earlier catalogs and advertisements and U.S. patents, THK described the LMG as a linear ball bearing, among other descriptions. *See* Tr. 119; Def.'s Exs. A-E, L1–10. In addition, Mr. Gridley and Mr. Bandrowski both testified that they in-

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[2] Mr. Bandrowski reinforced this testimony, stating that his understanding of the term housed bearing is "a unit that is comprised of a separate ball bearing * * * and a separate housing." Tr. 128. The LMG structure, however, includes a shaft and rail, as well as a casing that contains part of the bearing elements. *See* Tr. 133.

terpret HTSUS Explanatory Note to Section 8482, subsections (A)(2) and (3), to describe LMGs, while the Explanatory Note to Section 8483 suggests that LMGs are not housed bearings. *See* Tr. 104–08; 144–48.

This Court previously held that LMGs fall within the definition of ball bearings, stating that LMGs are merely "an improved version of a linear ball bearing." *THK*, 17 CIT at 1176, 837 F. Supp. at 434. Despite the new evidence presented at trial by THK regarding preloading, the Court remains convinced that THK's LMGs properly fall under the definition of ball bearings.

First, a ball bearing is structurally comprised of an inner race, an outer race, and balls, all of which LMGs contain. The uncontroverted testimony indicates that the LMG casing provides built-in inner races with balls, and the rail grooves function as the outer races. Tr. 117–18.

Second, the Court finds that, despite preloading, LMGs function as ball bearings. As a preliminary matter, competing testimony was presented over whether all of THK's LMGs are preloaded since the evidence demonstrates that ball bearings may be preloaded and LMGs may not be preloaded. According to Mr. Bandrowski, a recent THK catalog indicates that THK manufactures the same model LMG in three different stages of clearance. Tr. 119–20, 158 (referring to Pl.'s Ex. 3, at 134). While Dr. Seireg testified that all THK LMGs, by their nature, are preloaded, Tr. 61, upon inspection by the Court, THK's own catalog states that certain LMGs are available in the following stages of clearance: "normal," "light preload" and "medium preload." *See* Pl.'s Ex. 3, at 134; *see also id.* at 230. Hence, it appears that at least certain THK LMGs are not preloaded and are available with "normal" clearance.

Conflicting expert testimony was presented regarding the effect of preloading on the classification of LMGs. Based on this testimony, the Court is not convinced that preloading LMGs precludes their classification as ball bearings. Although there are several acceptable definitions of ball bearings, essentially all state that a ball bearing permits free motion between moving and fixed parts by utilizing balls rolling on a raceway. *See, e.g.*, McGraw-Hill Dictionary of Scientific and Technical Terms 175 (4th ed. 1989); 1 McGraw-Hill Encyclopedia of Science & Technology 601 (5th ed. 1982). In Dr. Seireg's own words, the "function, since ancient times, of using rolling motion is to minimize friction, carry loads and * * * guide the motion." Tr. 32. As Mr. Bandrowski testified, in operation, the lower balls come out of preload, allowing the LMGs to carry an application load smoothly. Tr. 122. Hence, LMGs clearly operate as ball bearings, carrying a load utilizing a ball-rolling motion.[3]

The Court's position is not inconsistent with Dr. Seireg's testimony, as LMGs are clearly high friction bearings designed for control and precise positioning. However, while preloading THK's LMGs may not allow friction to be reduced as much as other ball bearings in order for LMGs

[3] Dr. Seireg testified that preloading causes certain LMG balls to actually slide at times, significantly increasing friction. Tr. 41–42. Despite this sliding, the Court agrees with Mr. Gridley and Mr. Bandrowski that the LMG primarily functions as a ball bearing, reducing friction enough to enable loads to be carried in a stiff ball-rolling motion along a raceway.

to accomplish their task, they unquestionably permit movement between two entities by reducing friction, and so, are antifriction ball bearings.

The position that LMGs are ball bearings is also supported by THK's pre-1986 catalogs and advertisements, THK's U.S. patent language and the Explanatory Note dealing with Section 8482. Dr. Seireg testified that an LMG is a conglomerate linear unit that houses a ball bearing. *See* Tr. 32, 45, 57, 69. Further, certain catalog and patent language refers to the LMG as a "linear motion ball bearing *unit*" and "linear ball bearing *unit*." *See generally* Def.'s Exs. A-E, L1–3, 5–6. Nevertheless, THK repeatedly refers to the LMG as a ball bearing, explicitly admitting that it is commonly and commercially known as such. *See generally* Def.'s Exs. A-E, L1–10.

The Explanatory Note for Section 8482 also supports this position. The Court notes that the Explanatory Notes are the official interpretation of the HTSUS, but are not legally binding. *See* Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988) ("while they should be consulted for guidance, the Explanatory Notes should not be treated as dispositive"). Mr. Gridley and Mr. Bandrowski observe that the Explanatory Note for ball bearings, 84.82 (A), expressly includes "**slide mechanisms with bearing balls**," and lists certain examples encompassing LMGs.[4] *See* Tr. 105–06, 144–46. Mr. Gridley testified that LMGs fall within this primary description since, despite their preloaded nature, their balls roll, creating a sliding motion across the rail. Tr. 95. As this Court stated in *THK*, 17 CIT at 1176, 837 F. Supp. at 434, and as the uncontroverted testimony in this case indicates, this Explanatory Note accurately describes THK's LMGs since the LMGs slide across a rail with bearing balls.[5]

Consequently, THK has not overcome Customs' presumption of correctness and the Court finds no reason to depart from its position in *THK*, 17 CIT at 1176, 837 F. Supp. at 434, that THK's LMGs are structurally and functionally ball bearings. With respect to Customs' counterclaim, the import LMG parts were therefore improperly classified as other machinery parts under HTSUS 8485.90.00 and are properly classified as ball bearing parts under HTSUS 8482.99.10.

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[4] The Court finds the following example particularly relevant: "(2) The restricted-travel type, of steel, comprising a grooved cylinder, a ball cage and a housing." Explanatory Notes, Section 84.82, subsection (A)(2).

[5] The Court further agrees with Mr. Gridley and Mr. Bandrowski that the Explanatory Note to THK's proposed section, HTSUS 8283, indicates that bearing housings are separate from ball bearings themselves. *See* Tr. 108, 147. The relevant Explanatory Note language states the following: "Bearing housings incorporating ball, roller or needle roller bearings remain classified in this heading; but ball, roller or needle roller bearings presented separately fall in **heading 84.82**." Explanatory Notes, Section 84.83, subsection (B).

The Court also finds it significant that the HTSUS article description that THK suggests for LMG parts, HTSUS 8483.90.30, specifies that it encompasses "[other] parts of bearing housings and plain shaft bearings." This language supports the position that the HTSUS 8483 references to housed bearings contemplates separate items (*i.e.*, a housing and a bearing), as it specifically refers to parts of bearing *housings* and there is no other provision in HTSUS 8483 for parts of conglomerate *housed bearings*.

(Slip Op. 97–35)

UNITED STATES OF AMERICA, PLAINTIFF *v.* KAB TRADE CO., J. OUN INTERNATIONAL, INC., WASHINGTON INTERNATIONAL INSURANCE CO., AND JULIE OUN, DEFENDANTS

WASHINGTON INTERNATIONAL INSURANCE CO., CROSS-CLAIMANT *v.* KAB TRADE CO., J. OUN INTERNATIONAL, INC., AND JULIE OUN, CROSS-DEFENDANTS

Court No. 96–06–01635

[Motions to dismiss and for more definite statement denied.]

(Dated March 26, 1997)

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Andrea I. Kelly)*, for plaintiff.

Politis & Politis (John N. Politis) for defendants and cross-defendants KAB Trade Co., J. Oun International, Inc., and Julie Oun.

Glad & Ferguson (T. Randolph Ferguson) for defendant and cross-complainant Washington International Insurance Co.

MEMORANDUM OPINION

DICARLO, *Senior Judge:* Plaintiff instituted this action for collection of duties and penalties against defendants KAB Trade Company; J. Oun International, Inc. (J.O. Int'l); Julie Oun, an officer and stockholder of both KAB Trade and J.O. Int'l; and Washington International Insurance Company. Plaintiff alleges that defendants violated 19 U.S.C. § 1592 by undervaluing merchandise in connection with 533 entries filed with the United States Customs Service at the port of Los Angeles between July 1, 1991 and March 31, 1993. (Compl. at 2–3.) J.O. Int'l was the importer of record for five of those entries; the remainder were attributed to KAB Trade. *Id.* Plaintiff claims that the violation was due to gross negligence, or in the alternative to negligence. *Id.* at 7–8. This court has jurisdiction under 28 U.S.C. § 1582 (1994).

Defendants J.O. Int'l and Julie Oun have moved for an order to dismiss for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for failure to state a claim upon which relief can be granted. U.S. Ct. Int'l Trade R. 12(b)(1–2, 5). Defendants KAB Trade, J.O. Int'l, and Julie Oun have moved for a more definite statement of the portions of the complaint that allege gross negligence. U.S. Ct. Int'l Trade R. 12(e). Both motions are denied.

BACKGROUND

KAB Trade is a closely-held importer and wholesaler of general merchandise with approximately four employees. Julie Oun owns the corporation, and is its secretary and sole stockholder. (Pl.'s Resp. Defs.'s Mot. Dismiss App. at 56, 59 (Dun & Bradstreet Report); Pl.'s Suppl. App. Docs. 2, 4 (certified copies of documents filed by KAB Trade with the

Secretary of State for the State of California).) Ms. Oun is also the president of J.O. Int'l, which shares an address with KAB Trade. (Pl.'s Resp. App. at 62 (Dun & Bradstreet Report); Pl.'s Suppl. App. Docs. 1, 3 (certified copies of documents filed by J.O. Int'l with the Secretary of State for the State of California).) J.O. Int'l was incorporated in May 1990, KAB Trade in April 1991. (Pl.'s Suppl. App. Docs. 3–4.) The state of California filed liens for J.O. Int'l state tax debts against KAB Trade in 1992. (Pl.'s Resp. App. at 60 (Dun & Bradstreet Report).)

An audit and investigation by Customs concluded that the alleged undervaluation had deprived the United States of $47,110.70 in duties. (Compl. at 4.) Accordingly, Customs issued a pre-penalty notice and demand for payment to KAB Trade on March 4, 1994. The notice indicated that KAB Trade had thirty days to exercise its right to contest the proposed penalty. *Id.* at 1–2; *see* 19 U.S.C. § 1592(b); 19 C.F.R. § 162.78 (1993) (presentations responding to pre-penalty notice). Customs issued a penalty notice on or about March 24. (Compl. at 4.) On April 1, Ms. Oun submitted a petition for review on behalf of KAB Trade. (Pl.'s Resp. App. at 29.) Customs responded on May 25 in a letter addressed to Ms. Oun. The letter stated that on review Customs had concluded that the alleged violation had occurred due to gross negligence. *Id.* at 32.

On August 5, Customs sent a bill for a penalty of $188,442.80 and a second demand for payment of $47,110.70 in duties owed. Both were addressed to Julie Oun at KAB Trade. The bill stated that KAB Trade's right to petition at the administrative level had expired, and that the only further option available, other than payment in full, was the filing of an offer of compromise. *Id.* at 37–39. On August 30, Ms. Oun filed an offer of compromise of $11,017.20 and sent Customs a cashier's check for that amount, while claiming that Customs had not yet responded to the April 1 petition for review. *Id.* at 40–43. Ten months later, on June 27, 1995, Customs issued a second bill for the penalty. *Id.* at 44. Customs rejected the offer of compromise on August 14, 1995. *Id.* at 45. On October 31, it issued a final demand for payment of the penalty and duties owed, also addressed to Ms. Oun at KAB Trade. *Id.* at 47. On June 28, 1996, plaintiff instituted this action for collection of the amount owed.

Discussion

In a proceeding for the recovery of a monetary penalty claimed by the United States under § 1592, "all issues, including the amount of the penalty, shall be tried de novo." 19 U.S.C. § 1592(e)(1) (1994). In the context of a motion to dismiss, the material allegations of a complaint are taken as admitted and are liberally construed in favor of the plaintiff. The court will not dismiss the action if the allegations, when assumed to be true, state a claim upon which the court may grant relief. *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 348, 821 F. Supp. 1514, 1515 (1993); *see also e.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 421–22, *reh'g denied*, 396 U.S. 869 (1969); *Humane Soc'y of United States v. Brown*, 19 CIT ____, ____, 901 F. Supp. 338, 340 (1995).

I

Defendants J.O. Int'l and Julie Oun claim that Customs did not give them adequate notice of their potential liability because it named only KAB Trade during the pre-penalty and penalty phases of its investigation. They argue that this failure to give notice was a violation of due process, and that therefore Customs has not yet exhausted its administrative remedies, forcing the court to dismiss this action for lack of personal and subject matter jurisdiction. (Defs.'s Mem. Support Mot. Dismiss at 2.) Ms. Oun also asserts that liability for customs duties is a personal debt of the importer of record and its surety company only, and that therefore she is not liable for any duties or penalties owed. *Id.* at 6.

The Court of Appeals for the Federal Circuit (CAFC) has held that a failure to name corporate officers in their individual capacities in pre-penalty and penalty notices does not preclude an enforcement action against them to recover a penalty originally assessed against the corporation. *United States v. Priority Products, Inc.*, 793 F.2d 296 (Fed. Cir. 1986); *see also United States v. Modes, Inc.*, 13 CIT 780, 723 F. Supp. 811 (1989). Defendants in *Priority Products* contended that Customs had failed to provide adequate notice of their potential liability. As characterized by the CAFC, defendants' argument was that failure to do so was a violation of due process that deprived the Court of International Trade of personal jurisdiction over any defendant not previously named at the administrative level. *Priority Products*, 793 F.2d at 300. The CAFC held that bringing an enforcement action against a party not expressly named in the administrative proceedings is not a *per se* violation of due process. *Id.* at 299–300; *Modes*, 13 CIT at 785, 723 F. Supp. at 815 (quoting *Priority Products*). It also found that even assuming that personal jurisdiction is required at the pre-penalty phase, on the facts of the case, the defendants had received due process at the administrative level. *Priority Products*, 793 F.2d at 300–01.

Procedural due process consists of notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). A party may have either actual or constructive notice. A defendant in a customs proceeding has constructive notice if she "was or should have been aware that under certain circumstances she could be held accountable" for customs penalties owed by a corporation. *Priority Products*, 793 F.2d at 301. The court will often find constructive notice when the defendant is one of a very small number of owners, officers, or employees. *Id.*; *Modes*, 13 CIT at 785, 723 F. Supp. at 815. It may also find notice when the defendant participated in earlier proceedings, *Modes*, 13 CIT at 785, 723 F. Supp. at 815 (defendant testified in enforcement proceeding and personally notified attorney not to comply with summons from Customs), or in other circumstances where it is evident that the defendant is or should be aware of his potential liability, *United States v. Dantzler Lumber & Export Co.*, 16 CIT 1050, 1059, 810 F. Supp. 1277, 1285 (1992) (where defendants had already been convicted of fraud in a related criminal case,

it was "safe to assume that the trial in the district court adequately apprised the defendants of the scenario of [the Customs] action.").

There can be no doubt that Ms. Oun had actual notice of the penalty proceeding. She is an officer and the sole owner of KAB Trade. Correspondence from Customs was addressed to her, and she alone responded on behalf of KAB Trade. (*See* Pl.'s Resp. App. (copies of correspondence between Customs and Ms. Oun).) She also had at least constructive notice of the possibility of personal liability. Contrary to Ms. Oun's assertion, neither the statute nor the regulations limit liability for customs penalties to the "importer of record." A corporate officer may be liable for false statements made by a corporation if the officer knowingly participated in the deception or failed to correct the false statements upon learning of them. *United States v. Appendagez, Inc.*, 5 CIT 74, 79–80, 560 F. Supp. 50, 54–55 (1983). At this stage of the proceedings, the court cannot hold as a matter of law that Ms. Oun is shielded from liability. Ms. Oun did not hire an attorney during the administrative proceedings, (Defs.'s Mem. Support Mot. Dismiss at 3–4), and may not have fully realized the extent of her potential personal responsibility for some of KAB Trade's liabilities. Nevertheless, an officer exercising reasonable care under the circumstances would have investigated that possibility. The court therefore concludes that Ms. Oun had constructive notice of her potential liability, and received all the process she was due. *See Priority Products*, 793 F.2d at 301 (defendant "should have been aware" of potential liability); *Modes*, 13 CIT at 785–86, 723 F. Supp. at 815.

Similar considerations lead the court to conclude that J.O. Int'l also had notice of its potential liability. There are a number of situations in which a court will hold a corporation liable for the debts of a related corporation: when one is a mere instrumentality for the other, in a *de facto* merger or continuation, when there is an express or implied agreement that one will assume the other's debts, or when a change in corporate form is motivated by fraud. *See, e.g.*, *United States v. Ataka America, Inc.*, 17 CIT 598, 600–02, 826 F. Supp. 495, 498–99 (1993). Again, the court cannot hold as a matter of law that J.O. Int'l is shielded from liability. While the exact relationship between J.O. Int'l and KAB Trade is not evident on the pleadings, the corporations were sufficiently intertwined that they should have been aware of their potential liability for one another's debts under one of the above scenarios. The two companies had the same registered agent and shared at least one officer. They also had the same address and engaged in the same import activity. (*Cf.* Pl.'s Resp. App. at 56, 59; Pl.'s Suppl. App. Docs. 2, 4, *with* Pl.'s Resp. App. at 62; Pl.'s Suppl. App. Docs. 1, 3.) Moreover, KAB Trade had already been held liable for tax liens against J.O. Int'l. (Pl.'s Resp. App. at 60 (Dun & Bradstreet Report).) At trial, J.O. Int'l may be able to establish that it is not liable for KAB Trade's debts, but the possibility of liability is substantial enough that under the circumstances J.O. Int'l can be said to have had constructive notice of it.

As all of the defendants had notice, their due process claim must rest on the question of whether they had an adequate opportunity to be heard at the administrative level. The court will dismiss an enforcement action for failure to exhaust administrative remedies if Customs does not allow adequate time for defendants to respond. *United States v. Chow*, 17 CIT 1372, 841 F. Supp. 1286 (1993). Defendants have thirty days to prepare a written and oral response to a pre-penalty notice unless the statute of limitations will run in less than one year. 19 C.F.R. § 162.78 (1993) (implementing 19 U.S.C. § 1592(b)(1)(A)(vii)). In *Chow*, Customs gave the defendant only seven days to respond even though two years and five months remained before the defendant could have raised the statute of limitations as a defense. The court dismissed the action on the grounds that the defendant had had no adequate opportunity to be heard at the administrative level, in violation of due process. *Chow*, 17 CIT at 1376, 841 F. Supp. at 1289–90; *cf. United States v. Obron Atlantic Corp.*, 18 CIT 771, 775–76, 862 F. Supp. 378, 382–83 (1994) (Customs' failure to provide a thirty-day response period was harmless error, as "[i]t is necessary * * * to assess whether [defendant] in fact received due process at the administrative level rather than enforce a rigid application of Customs' regulations.").

The defendants here had ample opportunity to participate at the administrative level. Over two years elapsed between the date of the pre-penalty notice and the beginning of this enforcement action. Customs advised KAB Trade through Ms. Oun that it had thirty days to respond to the pre-penalty notice. (Pl.'s Resp. App. at 1–2.) Ms. Oun submitted a written response. *Id.* at 29. After defendants' right to petition at the administrative level expired, Customs informed Ms. Oun that she had the option of filing an offer of compromise. *Id.* at 37–39. Ms. Oun filed an offer that was ultimately rejected. *Id.* at 40–43, 45. Defendants clearly had time to prepare and present a response "as to why a claim for a monetary penalty should not be issued in the amount stated." 19 U.S.C. § 1592(b)(1)(A)(vii) (1994). Therefore, there was no due process violation that would divest this court of personal jurisdiction over any of the defendants.

As the court concludes that the pleadings, if proven, would establish that defendants received due process at the administrative level, it does not address the question of whether *Nickey v. Mississippi* applies to actions brought in this court under 19 U.S.C. § 1592 (1994). *Nickey v. Mississippi*, 292 U.S. 393 (1934) (opportunity for trial *de novo* affords defendants all due process to which they are entitled: no constitutional mandate that defendant have notice and opportunity to respond at administrative level if "all available defenses may be presented to a competent tribunal before exaction of the [obligation]"); *see also Priority Products*, 793 F.2d at 300; *Modes*, 13 CIT at 786 n.3, 723 F. Supp. at 816 n.3 (also declining to address *Nickey*).

II

Defendants' claim that this Court lacks subject matter jurisdiction over any of the parties because Customs has not exhausted its administrative remedies is equally unavailing. The court in *Priority Products* noted that "nothing in [19 U.S.C. § 1592] or its legislative history demonstrate that Congress intended to narrowly circumscribe the subject matter jurisdiction of the Court of International Trade to encompass only those suits brought by the Government against parties expressly named in the administrative proceedings." *Priority Products*, 793 F.2d at 299. The fact that Customs previously named only KAB Trade therefore does not constitute a failure to exhaust all administrative remedies.

Even if Customs had not fully exhausted its administrative remedies, the court would still have authority to accept the case. Exhaustion of administrative remedies is ordinarily a prerequisite to judicial review, *United States v. Bavarian Motors, Inc.*, 4 CIT 83, 86 (1982), and administrative agencies are not immune from that requirement. *Priority Products*, 793 F.2d at 300; *Bavarian Motors, Inc.*, 4 CIT at 86. However, this court has "explicit authority to waive exhaustion of administrative remedies[.]" *Modes*, 13 CIT at 786, 723 F. Supp. at 815–16 (citing 28 U.S.C. § 2637(d) (in an enforcement action, "the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies.") (emphasis added)); *Priority Products*, 793 F.2d at 300. Waiver is appropriate when a procedural defect at the administrative level amounts to harmless error because the defendant has in fact had a reasonable opportunity to be heard. *United States v. Obron Atlantic Corp.*, 18 CIT 771, 774–76, 862 F. Supp. 378, 382–83 (1994); *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 349–50, 821 F. Supp. 1514, 1516 (1993). As discussed above, defendants were "afforded ample opportunity to achieve the administrative remedies available * * * under the statute and regulations." *Modes*, 13 CIT at 786, 723 F. Supp. at 816. The court would therefore be justified in waiving exhaustion of administrative remedies, should such a waiver be necessary.

III

In their motion for more definite statement, defendants KAB Trade, J.O. Int'l, and Julie Oun argue that since the maximum penalty for gross negligence is double that for negligence, 19 U.S.C. § 1592(c)(2–3) (1994), the court should require the government to plead its allegations of gross negligence with greater specificity than its allegations of mere negligence. (Defs.'s Mem. at 9.)

There are three degrees of culpability under § 1592: negligence, gross negligence, and fraud. A violation is negligent if the offender fails to exercise reasonable care and competence. 19 C.F.R. pt. 171 app. B(B) (1996). It is grossly negligent if the offense results from "actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." *Id.* Plaintiff has not alleged that the defendants committed fraud.

It is true that both the maximum penalty and the government's ultimate burden of proof are higher for gross negligence than for negligence. The government must prove every element of the definition of gross negligence, while for ordinary negligence it need only show that acts or omissions constituting a violation occurred. 19 U.S.C. § 1592(e)(3–4) (1994). In the latter case, defendants then have the burden of showing that those acts or omissions did not occur as the result of negligence. *Id.* However, the pleading requirements of this court draw no distinction between the two degrees of culpability. Rule 9(b) states that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." U.S. Ct. Int'l Trade R. 9(b). Thus while fraud must be pleaded with particularity, all other states of mind may be pleaded generally, including those required for gross negligence: knowledge, indifference, and wanton disregard. Defendants are asking the court to create an additional subcategory of specificity in pleading that the plain language of Rule 9(b) neither requires nor permits. This the court is unwilling to do.

The purpose of a motion for more definite statement is to correct a pleading "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading[.]" U.S. Ct. Int'l Trade R. 12(e). Its purpose is not to convert a pleading into an evidentiary record sufficient to support a motion for summary judgment. *United States v. Obron Atlantic Corp.*, 18 CIT 771, 777, 862 F. Supp. 378, 383 (1994); *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 350, 821 F. Supp. 1514, 1517 (1993) (Rule 9(b) does not require the pleading of detailed evidentiary matters). This court has held that a pleading describing the date, place, and content of alleged misrepresentations is sufficient to allege fraud. *Obron*, 18 CIT at 777, 862 F. Supp. at 383; *Natori*, 17 CIT at 351, 821 F. Supp. at 1517; *United States v. F.A.G. Bearings Corp.*, 8 CIT 201, 206–07, 615 F. Supp. 562, 567 (1984). Plaintiff's complaint includes the time and place of the alleged misrepresentations: from July 1, 1991 to March 31, 1993, at the port of Los Angeles. (Compl. at 2–3.) It also identifies the statements at issue: 533 Customs entries allegedly undervaluing imported merchandise. Since the pleading is stated with particularity sufficient to support even an allegation of fraud, it is certainly not too vague or ambiguous to support a claim of gross negligence. Accordingly, the court finds that the complaint is sufficient as written.

CONCLUSION

Defendants' motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted is denied. Defendants' motion for more definite statement is also denied.

(Slip Op. 97–36)

LONZA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–08–00606

[Plaintiff's Motion for Summary Judgment denied; Plaintiff's Alternative Motion for Summary Judgment granted. Defendant's Motion for Summary Judgment granted.]

(Decided March 27, 1997)

Galvin & Mlawski, (John J. Galvin, Jack Mlawski) for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert);* United States Customs Service *(Edward N. Maurer),* of counsel, for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* Plaintiff, Lonza, Incorporated ("Lonza"), challenges the classification of "Mono-4-Nitrobenzyl Malonate Magnesium Salt Dihydrate" ("imported salt"),[1] an inorganic salt of the organic acid ester of malonic acid, by the United States Customs Service ("Customs"). Both parties agree the imported merchandise was erroneously classified by Customs upon liquidation as "Acyclic Polycarboxylic Acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: other: products described in Additional U.S. Note 3 to Section VI" under Subheading 2917.19.20 of the Harmonized Tariff Schedule of the United States ("HTSUS").

Plaintiff claims that the merchandise is correctly classified as "Acyclic Polycarboxylic Acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: other: other: other:" under Subheading 2917.19.50,[2] HTSUS, at the rate of 4% *ad valorem*. In the alternative, Plaintiff agrees with Defendant's contention that the merchandise is properly classified as "Acyclic Polycarboxylic Acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives: other: other: derived in whole or in part from aromatic hydrocarbons" under Subheading 2917.19.40, HTSUS, at the rate of 3.7¢/kg + 12.5%.

The entry at issue in this action was imported through the port of Newark, New Jersey on August 16, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

The parties have submitted competing motions for summary judgment based on stipulated facts. The Court finds that by operation of

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[1] The parties agree that the imported merchandise was invoiced as "Mono-4-Nitrobenzyl Malonate Magnesium Salt Dihydrate". They also agree that it consists of Propanedioic Acid, Mono [(4-nitrophenyl) methyl] ester, Magnesium Salt, CAS Registry No. 75321–09–4. Stipulation of Material Facts In Lieu Of Trial ("Stip.") at ¶1.

[2] This Subheading was deleted from the HTSUS, effective on January 1, 1995, as a result of the Presidential Proclamation effecting the Uruguay Round of the GATT, and Presidential Proclamation 6641 which implemented the North American Free Trade Agreement. Harmonized Tariff Schedule, Change Record (1995).

Chapter Notes 5(a) and (c)(1) and Subheading Note 1 to Chapter 29, the phrase "derived in whole or in part from aromatic hydrocarbons", contained in 2917.19.40, HTSUS, does not apply only to the imported salt's chemical precursor. Rather, it applies to any portion of the imported salt derived from aromatic hydrocarbons. As a result, the Court grants the classification requested by both parties under Subheading 2917.19.40, HTSUS, and denies Plaintiff's alternative classification under Subheading 2917.19.50, HTSUS.

II

STATEMENT OF MATERIAL FACTS

The merchandise at issue is an inorganic salt of an organic acid ester, formed by the reaction of Propanedioic Acid, Mono [(4-nitrophenyl) methyl] ester and Magnesium Ethoxide. Stip. at ¶5. The imported salt is a derivative of a polycarboxylic acid. Stip. at ¶4. The organic acid ester from which the imported salt is derived is Propanedioic Acid, Mono [(4-nitrophenyl) methyl] ester and is an ester of Malonic Acid. Stip. at ¶10. This ester of Malonic Acid was formed by the reaction of Malonic Acid, Acetone and p-nitrobenzyl alcohol. Stip. at ¶9. If imported separately, these organic compounds would be properly classifiable under the following subheadings: for Malonic Acid, 2917.19.40 or 2917.19.50, HTSUS (depending on whether or not it was derived from aromatic hydrocarbons), Stip. at ¶15; for Acetone, 2914.11.10, HTSUS, Stip. at ¶14; and for p-nitrobenzyl alcohol, 2906.29.30, HTSUS. Stip. at ¶13.

Although the portion of the imported salt derived from malonic acid is not derived from aromatic hydrocarbons,[3] the portion of the imported salt derived from p-nitrobenzyl alcohol is derived from, and in fact contains, aromatic hydrocarbons. Stip. at p. 7. Consequently, the imported salt is an "aromatic" chemical compound as that term is defined in Additional U.S. Note 2(a) to Section VI of the HTSUS. Stip. at ¶3.

III

DISCUSSION

A

SUMMARY JUDGMENT MAY BE GRANTED BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT

The Court may grant a motion for summary judgment if "* * * the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). The Court may grant summary judgment only if it finds that no genuine issues of material fact exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). No genuine issues of material fact exist here, and summary judgment may be granted as a matter of law.

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[3] Additional U.S. Note 2(a) to Section VI of the HTSUS states: "[f]or the purposes of the tariff schedule * * * [t]he term 'aromatic' as applied to any chemical compound refers to such compound containing one or more fused or unfused benzene rings."

B

THE CHAPTER AND SUBHEADING NOTES DIRECT CLASSIFICATION OF THE IMPORTED SALT UNDER THE HEADING APPROPRIATE FOR THE MALONIC ACID PRECURSOR AND THE SUBHEADING APPROPRIATE FOR THE SALT AS IMPORTED

The issue in this case is one of statutory construction. The Court must determine whether Chapter Notes to a Heading which direct the classification of a chemical compound under the same Heading as that compound's chemical precursor also require classification of the chemical compound under the same Subheading as that compound's chemical precursor, or whether once the appropriate Heading is determined, the precursor may be superseded by the condition and character of the chemical compound as imported.

The parties dispute "whether the language of subheading 2917.19.40, HTSUS, *i.e.*, 'Derived in whole or in part from aromatic hydrocarbons', restricts classification in that subheading to compounds whose acid portion is so derived, or encompasses compounds any portion of which is derived from aromatic hydrocarbons." Stip. at p. 7. For the reasons that follow, the Court finds that this language applies where any portion of the compound is derived from aromatic hydrocarbons.

1

THE IMPORTED SALT IS PROPERLY CLASSIFIABLE UNDER THE HEADING IN WHICH MALONIC ACID IS CLASSIFIED

When considering the proper interpretation of a statute, it is wise to look first at its language.[4] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). General Rule of Interpretation ("GRI") 1 to the HTSUS provides:

> Classification of goods in the tariff schedule shall be governed by the following principles: * * * for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. * * *

The starting point for determining the proper classification of the imported salt, then, is examination of the appropriate Heading.

Heading 2917, HTSUS, provides for: "Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives". The imported merchandise is not any of the compounds listed in Heading 2917, *i.e.*, it is not itself "a polycarboxylic acid; an anhydride, halide, peroxide and/or a peroxyacid of a polycarboxylic acid; a halogenated, sulfonated, nitrated and/or nitrosated derivative of a polycarboxylic acid; or, a compound derivative, such as a sulphohalogenated, nitrohalogenated, nitrosulphonated or nitrosulfohalogenated derivative of a polycarboxylic acid." Stip. at ¶4. As a result, the imported salt may be properly classified under Heading 2917, HTSUS, only by operation of the relevant Chapter Notes.

[4] As Professor Stefan Riesenfeld once said, "Always read the statute. You may be surprised."

Chapter Note 5(c)(1) to Chapter 29[5] provides:

> Inorganic salts of organic compounds such as acid-, phenol- or enol-function compounds or organic bases, of subchapters I to X or heading 2942, are to be classified in the heading appropriate to the organic compound. * * *

The imported salt is an "inorganic salt of an organic compound" within the meaning of this Chapter Note. *See* Stip. at ¶6. Consequently, the Note directs classification of the imported salt in the "heading appropriate to the organic compound". Here, the organic acid ester Propanedioic Acid, Mono [(4-nitrophenyl) methyl] ("Prop. Acid"), is the compound from which the salt was formed. *Id.* In order to determine the appropriate Heading for the organic acid ester, Chapter Note 5(a) must be applied. This Note states:

> The esters of acid-function organic compounds of subchapters I to VII with organic compounds of these subchapters are to be classified with that compound which is classified in the heading placed last in numerical order in these subchapters.

Chapter Note 5(a) to Chapter 29, HTSUS.

As stated above, the Prop. Acid ester was formed by the reaction of Malonic Acid, Acetone and p-nitrobenzyl alcohol. Stip. at ¶9. Among these compounds, the Malonic Acid precursor is classified last in numerical order. Thus, the imported salt is classifiable in the Heading appropriate to its Malonic Acid precursor. Malonic Acid is properly classifiable under Heading 2917 because it "is an acyclic polycarboxylic acid and an acid-function organic compound of subchapters I to VII, Chapter 29, HTSUS". Stip. at ¶15.

2

THE IMPORTED SALT IS NOT PROPERLY CLASSIFIABLE IN THE SUBHEADING APPLICABLE TO THE MALONIC ACID PRECURSOR

Plaintiff argues that the imported salt is properly classifiable under 2917.19.50, HTSUS, the Subheading applicable to the Malonic Acid precursor. Plaintiff reasons that the term "heading" found in the applicable Chapter Notes also applies to "subheading". If that reasoning is correct, the same steps explained above would mandate classification of the imported salt in the Subheading for Malonic Acid. Plaintiff also argues that because the Heading did not provide for "salts and esters", the subheadings may not provide for them because subheadings cannot expand the scope of headings. For the reasons that follow, Plaintiff's arguments fail.

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[5] Plaintiff argues that Chapter Note 5(c)(1) must be applied to the imported salt before Chapter Note 5(a), *see* Plaintiff's Mem. In Support Of Its Response To Defendant's Cross-Motion For Summary Judgment And Reply To Defendant's Response To Plaintiff's Motion For Summary Judgment at 6–7 ("Plaintiff's Response"), while Defendant applied Chapter Note 5(a) before Chapter Note 5(c)(1). Defendant's Mem. In Support Of Its Motion For Summary Judgment And In Opposition To Plaintiff's Motion For Summary Judgment at 5–6 ("Defendant's Mem."). At oral argument, held on January 29, 1997, counsel for the Defendant stated that the order in which the Chapter Notes were applied to the imported salt was irrelevant as the same classification resulted. In the Court's view, Chapter Note 5(c)(1) is the logical starting point for its analysis.

A

THE TERM "HEADING" IN CHAPTER NOTES 5(a) AND 5(c)(1) DOES NOT APPLY TO THE "SUBHEADINGS"

When determining the proper Subheading under which to classify a good, GRI 6 provides:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Subheading Note 1 to Chapter 29 states:

> Within any one heading of this chapter, derivatives of a chemical compound (or group of chemical compounds) are to be classified within the same subheading as that compound (or group of compounds) provided that they are not more specifically covered by any other subheading and that there is no residual subheading name *"Other"* in the series of subheadings concerned.

This Subheading Note, of course, applies to the subheadings under Heading 2917.

The Court finds that the Subheading Note directs classification of the imported salt under 2917.19.40, HTSUS, because a portion of the imported salt is "derived in whole or in part from aromatic hydrocarbons". Stip. at p. 7. The imported salt is also a derivative of Malonic Acid, a chemical compound. Stip. at ¶¶9, 17. According to the terms of the Subheading Note, however, the imported salt must be classified in the same subheading as the Malonic Acid only if there is no subheading which covers it more specifically or a residual subheading. Although the Malonic Acid itself is not derived in whole or in part from aromatic hydrocarbons, the portion of the imported merchandise derived from p-nitrobenzyl alcohol is derived from, *inter alia*, aromatic hydrocarbons. Stip. at p. 7. By application of GRI 6 and Subheading Note 1, then, the imported salt is properly classifiable in the Subheading where it is more specifically covered, *i.e.*, 2917.19.40, HTSUS, than in the Subheading which covers the compound of which it is a derivative, *i.e.*, 2917.19.50, HTSUS.

The Court rejects Plaintiff's argument that the language of Chapter Note 5(a) means that "once the particular compound last in numerical order is identified, Note 5(a) makes clear that the ester is 'to be classified **with** that compound' and that 'that compound', Malonic Acid, is indisputably classifiable under the claimed provision." Mem. In Support Of Plaintiff's Motion For Summary Judgment at 11 ("Plaintiff's Mem.") (emphasis in original). In other words, Plaintiff is arguing that once the compound described by Note 5(a) is identified, the imported merchandise is classified as though it consisted solely of that compound, in this case, Malonic Acid.

Plaintiff bases its argument on the assertion that the term "headings" encompasses "subheadings". Indeed, General Note 7(f)[6] to the HTSUS provides:

> the term ***"headings"*** refers to the article descriptions and tariff provisions appearing in the schedule at the first hierarchical level; the term ***"subheading"*** refers to any article description or tariff provision indented thereunder; **a reference to *"headings"* encompasses subheadings indented thereunder.**

HTSUS General Note 7(f) (emphasis added). Plaintiff concludes that the reference in Chapter Note 5(a) to "heading" must encompass the indented subheadings, requiring classification of the imported compound according to its Malonic Acid precursor.[7] Plaintiff's Mem. at 12.

Subheading Note 1 to Chapter 29, HTSUS, however, is *prima facie* evidence that the term "Heading" in the Chapter Notes was not intended to apply to the "subheadings". Further, the terms of the Subheading Note apply directly to classification at the subheading level. Indeed, a reading of the term "heading" in Note 5(a) and (c)(1) as applying to "subheading" would contradict the actual terms of the Subheading Note.[8]

Plaintiff also argues that Subheading Note 1 philosophically comports with the Chapter Notes, which direct classification under the provision for the chemical precursor. As a result, Plaintiff claims that Subheading Note 1 directs the classification of the imported product according to how the imported product was produced. According to Plaintiff, then, the imported salt is to be classified according to those chemicals used in its production, *i.e.*, Malonic Acid, Acetone, and p-nitrobenzyl alcohol.[9]

Subheading Note 1 would be surplusage if Plaintiff's interpretation of it was accurate. If Congress intended for the derivative of a compound to be automatically classified with that compound, the Subheading Note would be superfluous. If not for Subheading Note 1, the terms of the Chapter Notes would direct the classification of the product under the subheadings by operation of General Note 7(f). As a result, the deriva-

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[6] General Note 7 was redesignated as General Note 16. Proclamation No. 6641, Annex I, 58 Fed. Reg. 66867, 67032 (1993). Subsequently, General Note 16 was redesignated as General Note 19. Harmonized Tariff Schedule, Change Record (1995). Both parties cite to this provision as General Note 19(f). However, the Court cites to it as General Note 7(f) because that is how the provision appeared in the 1990 version of the HTSUS when the imported salt entered the United States.

[7] Defendant argued in response that "had the drafters of the statute meant, by the use of the term 'heading' in these notes, instead the term 'subheading,' they undoubtedly would have used the term 'subheading.'" Defendant's Mem. at 7. Defendant also argued that Plaintiff's reliance on General Note 7(f) is misplaced because that Note refers to "headings" and not "heading" as at issue here. *Id.*

As correctly pointed out by Plaintiff in its reply, Congress has stated that when interpreting a statute "unless the context indicates otherwise, words importing the singular include and apply to several persons, parties or things; words importing the plural include the singular." Plaintiff's Response at 10–11, *quoting* 1 U.S.C. § 1 (1988).

[8] As discussed previously, the terms of the Headings direct classification of the imported salt in the Heading appropriate for the organic acid ester. The contradiction is that the terms of the Subheading Note direct classification under the provision that more specifically covers the imported salt or into a residual "other" subheading, when possible, which is not provided for under the terms of the Headings.

[9] Defendant compares the HTSUS and the Tariff Schedules of the United States ("TSUS"), arguing the continuity between the two classification schedules with regard to the subject merchandise. Defendant's Mem. at 12–14. Plaintiff responded to this argument in its Post-Hearing Mem. In Support Of Plaintiff's Motion For Summary Judgment. As the Court has found that the terms of the HTSUS direct classification of the imported salt, we do not need to examine the TSUS to assist in classifying the merchandise.

tive chemical would be classified in the subheading that most specifically covered the precursor compound. In order, as we must, to give effect to all the words in the statute, *see United States v. Esso Standard Oil Co.*, 42 CCPA 144, 151 (1955) ("The primary rule for the construction of tariff statutes is to determine the congressional intent. The first source for the determination of this intent is the language itself * * *"), Subheading Note 1 must be read so as to direct the classification of the salt under the subheading that most specifically describes the salt. Thus, Plaintiff's arguments fail.

B

THE CHAPTER NOTES EXPAND THE TERMS OF HEADING 2917 BY OPERATION OF LAW TO ENCOMPASS THE IMPORTED SALT

The Court rejects Plaintiff's argument that the Chapter Notes "do not expand, change, modify or in any way affect the language contained in the provisions of Chapter 29", Plaintiff's Response at 3, but "plainly and unequivocally direct that classification is to be based on the organic compound from which the imported articles is formed." *Id.* Plaintiff bases its argument on the proposition that the six digit Subheading cannot be expanded beyond the four digit Heading which does not provide for the salt or ester. As a result, Plaintiff claims that the language "derived in whole or in part from aromatic hydrocarbons" is limited by the six digit subheading and four digit heading and thus is referring to the compounds provided for in Heading 2917, and that accordingly, only if Malonic Acid itself is derived from aromatic hydrocarbons may it be classified under 2917.19.40, HTSUS.

Plaintiff is correct in its assertion that the imported salt is classifiable in Heading 2917 by operation of the relevant Chapter Notes. These Notes expand the scope of the Heading so as to provide for the salts and esters as if specifically named in the Heading. Because the relevant Chapter Notes direct that the imported merchandise is classifiable within Heading 2917, HTSUS, by law the "salts and esters" are described for tariff purposes within Heading 2917, HTSUS.

Support for this interpretation may be found within the subheadings under Heading 2917, HTSUS. They reveal that salts and esters are provided for *eo nomine* in some instances. For example, 2917.11, HTSUS, provides for "Oxalic acid, its salts and esters" and 2917.12, HTSUS, provides for "Adipic acid, its salts and esters". Heading 2917 must encompass salts and esters in order to give effect to the *eo nomine* provisions.[10]

According to the *Explanatory Notes to the Harmonized Commodity*

[10] Plaintiff stated that any time the terms of the subheadings contradict the Chapter Notes, the terms of the subheadings control as directed by GRI 6. This response does not explain how "salts and esters" can have specific call-outs in the text of the subheadings under Heading 2917 if Heading 2917 does not encompass "salts and esters".

Description and Coding System ("Explanatory Notes"),[11] methyl benzenesulfonate, the methyl ester of benzenesulfonic acid, is an ester formed by the reaction of benzenesulfonic acid with methyl alcohol. *Explanatory Notes*, p. 329 (1986 ed.). The *Explanatory Notes* state that benzenesulfonic acid is classifiable in Heading 2904 which covers "[s]ulfonated, nitrated or nitrosated derivatives of hydrocarbons, whether or not halogenated". *Id.* Methyl alcohol, according to the *Explanatory Notes*, is classifiable in Heading 2905 which covers "[a]cyclic alcohols and their halogenated, sulfonated, nitrated or nitrosated derivatives". *Id.* The *Explanatory Notes* state that methyl benzenesulfonate is properly classifiable in Heading 2905. *Id.*

In its Supplemental Memorandum in response to a request from the Court for examples of compounds excluded from coverage in particular Headings of Chapter 29 by the absence of "salts and esters" language, Defendant provided a Declaration from Thomas F. Governo, Chief of Technical Operations for the Chemicals Unit of the New York Customs Laboratory. Defendant's Supplemental Mem. Exh. A ("Declaration").

Governo's Declaration demonstrates that if Heading 2904 covered "sulfonated * * * derivatives of hydrocarbons * * * and their salts and esters", the methyl benzenesulfonate would be described by Heading 2904 instead of Heading 2905, as directed by the *Explanatory Notes*. Declaration at ¶ 2. Because benzenesulfonic acid is a sulfonated derivative of the hydrocarbon, benzene, without the language "and their salts and esters", esters of sulfonic acid derivatives of hydrocarbons esterified with alcohols of Heading 2905 are excluded from Heading 2904. *Id.* This example provides additional evidentiary support for the reasoning set forth above.

IV

CONCLUSION

For the foregoing reasons, the Court enters a final judgment denying classification under Subheading 2917.19.50, HTSUS, and granting classification under Subheading 2917.19.40, HTSUS.

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[11] The *Explanatory Notes* are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council, the international organization that drafted that international nomenclature. The *Explanatory Notes* "do not constitute controlling legislative history," nevertheless, they "are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar Amer. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

(Slip Op. 97–37)

AMERICAN ALLOYS, INC., ET AL., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT

Court No. 94–01–00046

Plaintiffs move for judgment on the remand record pursuant to U.S. CIT R. 56.2, challenging the Department of Commerce's *Final Results of Redetermination on Remand Pursuant to Court Order, American Alloys, Inc., et al. v. United States Court No. 94–01–00046* (Aug. 16, 1995) *(Remand Determination)*. Plaintiffs argue the remand's conclusion that energy is physically incorporated into silicon metal during its production process departs from departmental practice, is unsupported by substantial evidence on the record and is otherwise not in accordance with law. Defendant argues the results are supported by substantial evidence on the record and are otherwise in accordance with law.

Held: Plaintiffs' motion for judgment on the remand record is denied. The Department of Commerce's remand determination is sustained. This action is dismissed.

(Dated March 28, 1997)

Baker & Botts, L.L.P. (William D. Kramer, Charles M. Darling, IV, David E. Maranville, Andrea F. Farr), Washington, D.C., for plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeffrey M. Telep), Robert E. Nielsen*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Plaintiffs, American Alloys, Incorporated ("American Alloys"), American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Incorporated, and SKW Metals and Alloys, Incorporated ("plaintiffs") challenge the Department of Commerce's ("Department" or "Commerce") remand determination in *Final Results of Redetermination on Remand Pursuant to Court Order, American Alloys, Inc., et al. v. United States*, Court No. 94–01–00046 (Aug. 16, 1995) *("Remand Determination")*. Plaintiffs argue the remand's conclusion that energy is physically incorporated into silicon metal departs from departmental practice, is unsupported by substantial evidence on the record and is otherwise not in accordance with law. Defendant responds evidence on the record supports Commerce's conclusion that energy is physically incorporated into silicon metal during the production process. As a result, defendant argues Commerce properly increased the U.S. price ("USP") of the silicon metal at issue by 12.5% to offset the *Reembolso* tax rebate.[1] This Court retained jurisdiction over this action during the pendency of Commerce's remand investigation, where the Court had jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988), which gives this Court jurisdiction to review final results of antidumping administrative reviews completed by the Department of Commerce, International Trade Administration ("ITA").

[1] *See infra* n.5.

II. BACKGROUND

Plaintiffs in this case are producers of silicon metal in the United States, and challenge the final results of Commerce's antidumping duty administrative review on silicon metal[2] manufactured in or exported from Argentina by Electrometalurgica, S.A.I.C. ("Andina") and Silarsa, S.A. ("Silarsa") during the period March 29, 1991 to July 31, 1992. *See Silicon Metal From Argentina; Final Results of Antidumping Duty Administrative Review*, 58 Fed. Reg. 65,336 (Dep't Comm. 1993) *("Final Results")*. The events which led to this action are set forth below.

A. *Administrative Review of Antidumping Duty Order:*

On September 3, 1992, Commerce published a notice announcing the opportunity to request an administrative review of the antidumping duty order on silicon metal from Argentina.[3] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 57 Fed. Reg. 41,725 (Dep't Comm. 1992). On September 30, 1992, plaintiffs and SiMETCO, Inc. filed a timely request for administrative review of the antidumping duty order on silicon metal from Argentina with respect to Andina and Silarsa. Andina and Silarsa also filed timely requests for review with the Department.

In response to the above requests, Commerce initiated an antidumping duty administrative review on imports of silicon metal from Argentina by Andina and Silarsa. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 57 Fed. Reg. 48,201 (Dep't Comm. 1992). As part of its review, the Department presented Antidumping Requests for Information ("Questionnaires") to Andina and Silarsa. Silarsa submitted its response to Commerce's questionnaire but subsequently indicated it would no longer participate in the administrative review. Andina maintained it was entitled to upward adjustments to U.S. price ("USP") under the terms of the tax clauses for certain taxes either not collected on export sales or rebated upon exportation.[4] One of these adjustments involved tax rebates it received under the Government of Argentina's *Reembolso* program.[5] Commerce decided, *sua sponte*, to conduct verification of the data Andina provided

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[2] Silicon metal "is not actually a metal. Rather, 'silicon metal' is a product containing at least 89 percent silicon, along with small amounts of other elements." (Pls.' Br. in Supp. of its Mot. for J. Upon Agency Rec. at 2n.2.)

[3] In *Final Determination of Sales at Less Than Fair Value: Silicon Metal From Argentina*, 56 Fed. Reg. 37,891, 37,895 (Dep't Comm. 1991), Commerce determined silicon metal from Argentina was being sold at less than fair value in the United States. When an antidumping investigation discloses the existence of dumping, an antidumping duty will be imposed when the import sales materially injure, threaten to materially injure, or materially retard the establishment of an industry in the United States. *See* 19 U.S.C. § 1671(a) (1988). The antidumping duty is the difference between the foreign market value ("FMV") of the goods and the value of those goods in the United States, known as the U.S. price ("USP"). This difference is also the dumping margin. *See American Alloys Inc. v. United States*, 30 F.3d, 1469, 1474 (Fed. Cir. 1994) *("American Alloys III")* (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993).) In setting the dumping margin in this case, Commerce increased the USP by 12.5% to offset the *Reembolso* tax rebate. *See infra*, n.5. This adjustment lowered the dumping margin on Andina's sales in the United States.

[4] Andina also held this position during in the original investigation.

[5] The manufacturers of silicon metal in Argentina are subject to several domestic taxes. The *Reembolso* program was established in 1971 and authorizes the Argentine government to rebate to silicon metal producers taxes and import duties levied on the purchases of raw materials used in the production of silicon metal. *See American Alloys, Inc. v. United States*, 17 CIT 8, 9, 810 F. Supp. 1294, 1295 (1993) *("American Alloys I")*; Def.'s Resp. to Pls.' Comm. on Remand Determ. ("Def.'s Resp.") at 2.

in the administrative review and did so at Andina's facilities in Argentina from July 12 to 16, 1993.

On August 23 1993, Commerce published a preliminary determination that silicon metal from Argentina was being sold at less than fair value during the period under investigation. *See Silicon Metal From Argentina; Preliminary Results of Antidumping Duty Administrative Review and Termination in Part*, 58 Fed. Reg. 44,499 (Dep't Comm. 1993). Commerce issued the final results of its administrative review on silicon metal from Argentina on December 14, 1994. *See Silicon Metal From Argentina; Final Results of Antidumping Duty Administrative Review*, 58 Fed. Reg. 65,336 (Dep't Comm. 1993) *("Final Results")* In the final results of the administrative review, Commerce accepted Andina's methodology for calculating certain costs associated with the production of silicon metal and made upward adjustments to USP for the total amount of the rebated taxes Andina received upon export of silicon metal to the United States. Commerce also concluded it was not required to determine whether taxes rebated by the Argentine government under the *Reembolso* program were directly imposed upon the silicon metal or its physically incorporated components before Commerce adjusted USP based upon 19 U.S.C. § 1677a(d)(1)(C)[6] because this form of inquiry occurs in a countervailing duty and not an antidumping investigation. Commerce stated "we are satisfied that the 'reembolso' program qualifies as a rebate of indirect taxes within the meaning of section 772(d)(1)(C) of the Tariff Act, and that an adjustment for the amount of the rebate is proper." *Final Results*, 58 Fed. Reg. at 65,342.

B. *Complaint:*

On February 14, 1994, plaintiffs challenged certain portions of the *Final Results*. Plaintiffs specifically argued Commerce, in adjusting USP, had not investigated whether the taxes rebated under the *Reembolso* program were imposed directly upon silicon metal or inputs physically incorporated into silicon metal. Plaintiffs asserted such an investigation was necessary to determine which of the taxes rebated under the *Reembolso* program were directly related to the exported merchandise or components physically incorporated therein. As a result, plaintiffs asserted Commerce's upward adjustments to USP improperly reduced the dumping margin, were unsupported by substantial evidence on the record and were otherwise not in accordance with law. (Compl. at 6.) Plaintiffs requested this Court remand the case to Commerce for further proceedings consistent with the judgment of this Court.[7]

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[6] *See infra* n.12

[7] Counts I(a) and (c) of the complaint, which are at issue in the present remand determination state:

> The Department's improper upward adjustments to USP reduced the antidumping margin assessed in the results of the administrative review. The following conclusions by the Department are unsupported by substantial evidence on the record and are otherwise not in accordance with law:
>
> (a) the Department's conclusion that the adjustment to USP for rebates of indirect taxes under section 772a(d)(1)(C) of the Act, 19 U.S.C. § 1677a(d)(1)(C), is not limited to rebates of taxes imposed directly on the merchandise under investigation or components thereof;

Continued

On March 17, 1994, plaintiffs moved to stay the proceedings in this action pending the resolution of an appeal to the Court of Appeals for the Federal Circuit ("CAFC") of the Court of International Trade's ("CIT") decision in *American Alloys, Inc. v. United States*, 17 CIT 8, 810 F. Supp. 1294 (1993) *("American Alloys I")*. In *American Alloys I*, plaintiffs challenged Commerce's final determination in the original antidumping duty investigation of silicon metal from Argentina.[8] *See Final Determination of Sales at Less Than Fair Value: Silicon Metal from Argentina*, 56 Fed. Reg. 37,891 (Dep't Comm. 1991). Both parties agreed the appeal of the original determination before the Federal Circuit involved issues similar to the ones present in this action, such as the proper interpretation and implementation of the statutory provision for adjusting USP pursuant to the tax clause for taxes rebated upon export. On September 11, 1995, this Court granted the motion and stayed the proceedings.

C. *American Alloys III:*

In *American Alloys, Inc. v. United States*, 30 F.3d 1469, 1474 (Fed. Cir. 1994) *("American Alloys III")*, the Federal Circuit reversed this Court's holding in *American Alloys I* that in an antidumping investigation Commerce need not conduct an inquiry to determine if rebated taxes are imposed directly on the merchandise at issue. The Federal Circuit held the Department may not adjust USP for a rebated tax unless it determines the rebated taxes bear "a direct relationship to the exported product or a physically incorporated component of that product." *Id.* Because Commerce had not determined if Argentina imposed the *Reembolso* taxes "directly upon the exported merchandise or components thereof," the Federal Circuit held Commerce lacked authority to raise USP to account for the rebates. *Id.* Pursuant to the Federal Circuit's determination that Commerce must undertake an inquiry to determine if the rebated taxes were imposed directly on the merchandise at issue, this Court remanded the case for a determination of whether the *Reembolso* taxes qualify as direct taxes. *See American Alloys Inc., v. United States*, Court No. 94–01–00046 (CIT May 1, 1995) (remand order).

D. *Motion for Judgment Upon the Agency Record & Motion for Remand:*

On January 26, 1995, plaintiffs moved for Judgment Upon the Agency Record pursuant to U.S. CIT R. 56.2, arguing Commerce's refusal to determine whether the taxes rebated under Argentina's *reembolso* pro-

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. . . . . .

(c) the Department's methodology of making an upward adjustment to USP for the full amount of the rebate received by Andina under the *reembolso* program by applying the absolute tax rate to the price of comparison merchandise sold in the country of exportation rather than to the price of the exported goods.

(Compl. at 6–7.)

[8] In *American Alloys I*, the Court of International Trade ("CIT") remanded to Commerce the final antidumping duty determination in the original investigation, instructing the Department to limit the adjustment to USP for any tax rebate to the amount of the tax actually passed through to home market purchasers. *See American Alloys I*, 17 CIT at 17, 810 F. Supp. at 1301. In *Court of International Trade Decision*, 58 Fed. Reg. 38,361 (Dep't Comm. 1993), Commerce found no taxes were being passed through and the CIT affirmed this determination. *See American Alloys, Inc. v. United States*, 17 CIT 613, 824 F. Supp. 238 (1993) *("American Alloys II")*. The CIT also affirmed the Department's determination that an inquiry to determine if the rebated taxes were imposed directly on the merchandise at issue was relevant to a countervailing duty investigation but not to an antidumping investigation. "Commerce properly determined that it need not conduct a 'physical incorporation' subsidy inquiry before making an upward adjustment to USP for indirect taxes rebated pursuant to Argentina's reembolso program." *American Alloys I*, 17 CIT at 14, 810 F. Supp. at 1299.

gram are directly imposed upon silicon metal or its physically incorporated components, as required by statute, was "contrary to the express terms and purpose of the statute." (Pls.' Br. in Supp. of Mot. for J. Upon Ag. Rec. ("Pls.' Br.") at 10.) Plaintiffs argued, "[i]n *American Alloys III,* the CAFC specifically held that before the Department can make any adjustments to USP for rebated taxes, there must be a demonstration of the direct imposition of the tax at issue upon the exported product or its physically incorporated components." *(Id.* at 10–11 (citing *American Alloys III,* 30 F.3d at 1474).)

On April 3, 1995, subsequent to the Federal Circuit's decision in *American Alloys III,* plaintiffs and defendant jointly moved for remand, stating

> [t]he appeal of the final determination in the original investigation involved the same parties, similar facts and, in general, the same arguments that are involved in Count I(a) of Plaintiffs' Complaint herein. Accordingly, judicial economy and efficiency would be achieved by permitting the Department to issue a redetermination with respect to Count I(a) that reflects the decision of the Court of Appeals [in *American Alloys III].* Count I(c) involves a related claim. Therefore, by remanding the issues raised by Counts I(a) and (c) of this action to the Department for redetermination, the Court can expedite the resolution of the instant appeal.

(Joint Mot. For Remand at 2.) On May 1, 1995 this Court granted the joint motion for remand, ordering Commerce to file its remand determination with the Court within 120 days of the remand order. The Court ordered Counts I(a) and (c) be remanded to Commerce for it to make a redetermination consistent with the Federal Circuit's decision in *American Alloys III.*[9]

On May 23, 1995, Commerce requested Andina identify which components used in the production of silicon metal were physically incorporated into silicon metal and which of the taxes paid, but rebated under the *Reembolso* program, were directly related to the silicon metal or the components physically incorporated therein. *See Remand Determination* at 2. Andina responded, but provided information only with respect to the physical incorporation of electrical energy and those related taxes.[10] Because of the amount of information submitted by Andina and given the controversial nature of the physical incorporation issue, Commerce conducted a verification at Andina's headquarters in Buenos Aires. (Def.'s Resp. to Pls.' Comm. on Remand Dterm. ("Def.'s Resp.") at 3.) Commerce verified the calculations provided by Andina that established (1) the amount of internal energy in silicon metal, (2) the total amount of energy used in, and generated by, the chemical reaction,

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[9] On May 11, 1995, this Court denied plaintiff's Motion for Judgment Upon the Agency Record as "moot and superceded by [the remand] order dated May 1, 1995." *American Alloys, Inc. v. United States,* Court No. 94–01–00046 (CIT May 11, 1995) (order denying plaintiffs' Motion for Judgment Upon the Agency Record).

[10] In its June 7, 1995 response to the Department's Questionnaire, Andina explained because it did not have the resources to prove the "direct and 'cascading' effect of 18 taxes," "Andina will only assign its resources to defend that energy is a physically incorporated component (a component that becomes an actual part of the resulting product). Andina selected energy because of the relative weight of energy cost into the final product and because of the incidence of indirect taxes imposed on energy." (Pls.' App. Tab 11 at 1.)

(3) the amount of heat loss in the production process, and (4) the breakdown of total energy between chemical energy, in-plant generated energy, and purchased energy. *Remand Determination* at 5–6. *See Verification Report (reprinted in* Pub. App. to Def.'s Resp. to Pls.' Comm. on Remand Results ("Def.'s App.") Attach. 1).

On July 31, 1995, Commerce issued draft final results of redetermination to the interested parties and received comments from the plaintiffs on August 9, 1995. Commerce issued its remand determination on August 16, 1995. *See Final Results of Redetermination on Remand Pursuant to Court Order, American Alloys, Inc., et al. v. United States,* Court No. 94–01–00046 (August 16, 1995) *("Remand Determination").* In accordance with the Federal Circuits's opinion and this Court's remand order, the Department analyzed whether indirect taxes rebated under Argentina's *Reembolso* program should be accounted for in the calculation of U.S. price pursuant to 19 U.S.C. § 1677a(d)(1)(C)[11] when determining the dumping margin. Andina submitted information concerning only the physical incorporation of energy into the production of silicon metal and the taxes rebated to this input and the Department allowed adjustment to USP solely for the rebated energy taxes received under the *Reembolso* program. Commerce calculated the dumping rates for Andina by making an upward adjustment to USP for the amount of the *Reembolso* tax rebate received for energy. *See Remand Determination* at 6. Plaintiffs filed comments on the *Remand Determination* on October 11, 1995. Defendants responded to plaintiff's comments on November 27, 1995.

E. *Additional Motions:*

On December 15, 1995, plaintiffs moved for Judgment on the Remand Record and the Record of the Underlying Administrative Review. Plaintiffs urged this Court hold the remand results to be unsupported by substantial evidence and otherwise contrary to law "because the U.S. Department of Commerce * * * erroneously granted an upward adjustment to U.S. price for taxes rebated under Argentina's *Reembolso* program when the taxes were not directly imposed on silicon metal or a physically incorporated component of silicon metal." (Pls.' Mot. For J. on Remand R. and R. of Underlying Admin. Rev. at 1–2.) Plaintiffs also requested the Court remand the matter to Commerce for it to recalculate the dumping margins and cash deposits of estimated dumping duties on imports of silicon metal from Argentina to eliminate any adjustment to USP for taxes rebated under the *Reembolso* program. In their motion, plaintiffs indicated plaintiffs and defendant agree the Court can decide the issues in this case without further briefing. *Id.* at 2.

On the same day, plaintiffs moved for Oral Argument on the Motion for Judgment Upon the Remand Record and the Record of the Underlying Administrative Review in order to "argue before this Court the law and facts at issue in the instant appeal." (Pls.' Mot. for Oral Arg. at 3.)

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[11] *See infra* n.12

On January 31, 1996, this Court denied plaintiffs' Motion for Oral Argument.

III. CONTENTIONS OF THE PARTIES

A. Plaintiffs:

Plaintiffs argue the remand determination is unsupported by substantial evidence on the record and is otherwise not in accordance with law in four principal respects. First, plaintiffs maintain the remand determination grants an upward adjustment to USP for taxes directly imposed on electricity, "notwithstanding the fact that the interested parties agree, and the record establishes, that *electricity* is not physically incorporated into the final product." (Pls.' Comm. on Remand Results ("Pls.' Comm.") at 3.) Second, plaintiffs argue the remand determination "would grant an adjustment to USP for taxes imposed on a production input that—like a fuel—is merely used to generate heat, and is consumed when it is used for that purpose." *(Id.)* Third, plaintiffs contend the remand determination "would grant an adjustment to USP for an input that is *not a physical substance*, and does not become a *physical property* of the resulting product and, therefore, is *not physically incorporated* into that product." *(Id.)* Finally, plaintiffs conclude the remand determination is "contrary to the evidence on the record, statutory and case law, established Department practice and prior Department determinations in cases involving indistinguishable facts, which were correctly decided under applicable law." *(Id.)*

B. Defendant:

Defendant argues Commerce's remand determination demonstrates its factual conclusion regarding the physical incorporation of electrical energy *"is* supported by substantial evidence on the record." (Def.'s Resp. at 5.) Defendant maintains although plaintiffs have presented an alternative interpretation of the record evidence, "it is not enough for it simply to advance an alternative interpretation, arguing that the evidence allegedly supports its position as well." *(Id.)* Rather, defendant contends, "this Court has previously pointed out 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *(Id.* (quoting *Daido Corp. v. United States*, 893 F. Supp. 43, 48 (CIT 1995) (further citations omitted).) In addition, defendant argues although there is case precedent involving other products where the Department has determined that energy has not met the physical incorporation standard, physical incorporation is a question of fact to be determined for each product in each case.

III. STANDARD OF REVIEW

This Court's jurisdiction to review the final results of Commerce's remand determination is limited to determining whether Commerce complied with the instructions of the Court and whether the remand results are supported by substantial evidence on the record and are otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1988). "Sub-

stantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed.Cir. (T) 77, 810 F.2d 1137 (1987).

IV. DISCUSSION

A. *Adjustments to USP:*

In order to prevent distorted dumping margins, United States antidumping laws permit numerous adjustments to foreign market value and U.S. price to account for differences between these two value measurements arising for reasons unrelated to dumping. *See, e.g.*, 19 U.S.C. §§ 1677a(d), 1677a(e), 1677b(a)(1), 1677b(a)(4) (1988); *see also Smith-Corona Group v. United States*, 1 Fed. Cir. (T) 130, 132–33, 713 F.2d 1568, 1571–72 (1983) (explaining fair market value and U.S. price represent prices in different markets affected by a variety of circumstances in the chain of commerce by which the merchandise reached the export or domestic market; pointing out both values are subject to adjustments in an attempt to reconstruct the price at a specific, "common" point in the chain of commerce, so that value can be fairly compared on an equivalent basis). Therefore, to avoid distortion of the dumping margin merely because an exporting country taxes home market sales but not export sales, for example, U.S. price can be adjusted so domestic taxes do not raise the apparent cost of the merchandise in the home country in comparison to merchandise's price in the United States. *See* 19 U.S.C. § 1677a(d)(1)(C) (1988).[12]

While both parties in this case agree case law now dictates Commerce may only adjust USP for taxes imposed directly on the product subject to investigation or on an input physically incorporated into that product,[13] they disagree on the question of whether energy is physically incorporated into silicon metal during the production process and then retained in the metal in this case.[14] As a result, this Court must determine whether the Department's conclusion on remand holding electrical energy to

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[12] The applicable statute, 19 U.S.C. § 1677a(d)(1)(C) (1988) provides

> **(d) Adjustments to purchase price and exporter's sales price.**
> The purchase price and the exporter's sales price shall be adjusted by being—
> (1) increased by—
> . . . . . .
> (C) the amount of any taxes imposed in the country of exportation *directly upon the exported merchandise or components thereof*, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are *added to or included in the price* of such or similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C) (1988) (emphasis added).

[13] *See supra* p.7–8 for a discussion of *American Alloys III*.

[14] Plaintiffs and defendant agree on the basic chemical equation that results in the formation of silicon metal. "[B]y combining a source of silicon, such as quartz, with a carbonaceous reductant and a source of energy the result will be silicon metal plus carbon monoxide and an amount of heat loss." *Remand Determination* at 4. The *Remand Determination* continues to note "[t]he basic disagreement between the parties is whether the resulting silicon metal actually retains the energy used to create the chemical reaction." *Id.*

be physically incorporated into silicon metal is supported by substantial evidence on the record and is otherwise in accordance with law.[15]

B. *Energy as a Physical Input of Silicon Metal:*

Plaintiffs argue "the record of this remand is completely devoid of *any* evidence that would support a determination that energy used in the silicon metal production process becomes a physical part of the silicon metal." (Pls.' Comm. at 7.) Plaintiffs contend the energy[16] used in the production of silicon metal is not a physical input and is not physically incorporated into the silicon metal produced. Plaintiffs maintain "[e]lectricity is not a raw material or a substance and, therefore, is not a physical input. * * * [T]he 'potential' energy that exists in the final product is not a *physical* property of silicon metal. Accordingly, the electricity used in producing silicon metal is not physically incorporated into the silicon metal." *(Id.* at 5–6.) Rather, plaintiffs argue the only raw material physically incorporated into silicon metal is the silicon from the quartz used to make the metal. Electrical energy, according to plaintiffs, does not enter into the chemical reaction, but merely supplies heat to the production process and is consumed in the process of generating heat. Plaintiffs conclude because heat is not a material, it cannot be a physical input into the production of silicon metal. Additionally, plaintiffs argue electricity "is not required to produce silicon metal" because "[t]here are several other possible sources of heat" and "the same chemical reaction * * * occurs regardless of the heat source." (Pls.' Comm. at 15.)[17] Andina, however, maintained:

> the electricity is not merely used to heat the charge. Through the heat of the charge with electricity, the silicon of quartz incorporates energy and becomes silicon metal. The energy is incorporated into the silicon metal. A smaller portion of energy is lost in the process. It is not the dissipation of heat that makes the silicon of the quartz

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[15] In its Questionnaire to Andina, Commerce explained

> [u]nder the law applicable to this remand, the Department considers that a physically incorporated component is a component that physically becomes a part of the resulting product. Thus, a physically incorporated component is not a component that is simply consumed in the production of the resulting product, but a component that becomes an actual part of the resulting product.

(See Department's Remand Questionnaire of June 7, 1995, reprinted in Pl.'s App. Tab 11 at 1.) The Department continued on to acknowledge it considered quartz to be a component that physically becomes a part of the resulting product, silicon metal, but asked Andina to explain why it believes other inputs—namely energy—are physically incorporated into silicon metal, and to show how each input becomes part of the resulting product. *(Id.)*

[16] In discussing energy, plaintiffs refer specifically to electricity. Plaintiffs state taxes for which Andina claimed an adjustment are directly imposed on *electricity* and not on any other form of energy. (Pls.' Comm. at 3–4.) Because the words energy and electricity are used interchangeably throughout the papers of the parties, this Court finds it useful to review briefly how these terms have been used during the course of this proceeding. In the *Remand Determination*, Commerce states plaintiffs "have made too fine a distinction between 'electricity' and 'electrical energy' to be meaningful." *Remand Determination* at 10. Commerce stated during verification, Andina's electrical engineers discussed with Commerce the issue of whether electricity can be equated to energy. *See Verification Report of July 25, 1995 (reprinted in* Def.'s App. Attach. 1 at 4.) Officials explained electricity creates the energy used in the production process, which is referred to as electric energy and is measured in kilowatts per hour. The Verification Report concluded "typically when electricity is discussed it is in the context of the amount of energy or heat that derives from it to be used to produce reactions." *Id.* at 5. Commerce adds Andina's energy supplier confirmed this fact in a letter describing the "energy" consumed by Andina and the "energy" taxes which were applied to Andina's purchases. *Remand Determination* at 10.

[17] Plaintiffs also cite the affidavit of silicon metal expert Earl K. Stanley, who states "[i]n the silicon metal production process, the flow of electrons from the electrode does not enter into the chemical reaction; it simply supplies heat to the process." (Pls.' App. Tab 7 at 2.) The expert added, "[e]lectricity is not needed to produce silicon metal * * *. A number of other sources of heat may be used * * *. Heat is not a material * * *. Therefore, heat is not a physical input into the production of silicon metal." *(Id.)*

> to become [sic] silicon metal; it is the incorporation of energy that makes the silicon of the quartz to become [sic] silicon metal.

Response of Andina to Department's Deficiency Questionnaire of June 30, 1995 (reprinted in Pls.' App. Tab 6 at 5).

In making its determination, Commerce asked Andina to provide any text or industry publication illustrating energy is physically incorporated into silicon metal or, alternatively, for an affidavit from a chemical engineer or other company official attesting to this claim. *See Response of Andina to Department's Remand Questionnaire of June 7, 1995 (reprinted in* Pls.' App. Tab 11). Commerce relied on the information Andina presented during verification, including a review of chemistry, chemical engineering and electrical engineering textbooks, as well as technical articles and concluded Andina had demonstrated "silicon metal does have a physical property of energy which is referred to as internal energy. This internal energy is measurable before and after the reaction takes place which produces silicon metal." *Remand Determination* at 7. Commerce explained if the reaction is reversed through a process called metalthermia, the energy may be removed from the silicon metal, "thus, demonstrating that energy is physically incorporated into the silicon metal." *Id.* Commerce explained Andina's production of silicon metal is characterized as electrointensive, due to the use of electrical energy in the production process, and, as such, electrical energy is a necessary component in the process Andina employs to produce silicon metal.[18]

In addressing the question of whether energy is physically incorporated into silicon metal, Commerce addressed plaintiffs' arguments that (1) electricity is simply fuel used to generate heat used in the reduction process, and, thus, the potential energy that exists in the final product is not a physical input of silicon metal; and (2) electricity is not a raw material or a substance and, therefore, not a physical input. (Pls.' Comm. at 4–5.) Commerce, however, stated it "disagree[d] with petitioners' assertion that energy is not physically incorporated into the silicon metal that is produced. * * * [P]etitioners' portrayal of electricity as being analogous to a fuel is misguided." *Remand Determination* at 8. In support of its determination, Commerce pointed to a technical article written for a conference of the Norwegian Ferroalloy Research Organization held in June 1995 and coauthored by Elkem Metals Company, one of the plaintiffs in this case, which addresses energy recovery in the produc-

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[18] In Andina's questionnaire response, Andina states its activity "is denominated 'electrointensive' due to the large proportion of electrical energy in its production process." *See Questionnaire Response of June 1, 1995 (reprinted in* Def.'s App. Attach. 4 at 1). Andina's response continues on to explain

> [t]he productive process for the manufacture of silicon metal is a process known as 'electrochemical' and/or 'electrothermic', and consists of the elimination of oxygen form [sic] quartz through the activation or rupture of the molecule through the application of energy.
>
> This reaction, based on scientific and technical knowledge with internationally available industrial applications, can only be carried out using electrical energy.
>
> * * * * * * * *
>
> Two very significant conclusions can be drawn from this explanation:
>
> a) the energy used in the production process forms a component part of the products obtained as a consequence of that process.
>
> b) the energy incorporated in the production process is not used to generate motor or mechanical force, but rather as a principal raw material to make possible the chemical reaction of reduction.

Id. at 1–2.

tion of ferroalloy products, including silicon metal. The article concludes:

> Energy input to ferro alloy furnaces in Norway is roughly divided in two equal parts: chemical energy in the form of carbonaceous reduction materials, and electrical energy. *About half of this total energy* is preserved in the produced alloy while the rest leaves the process in the form of various heat losses.

Remand Determination at 9 (quoting *Energy Recovery in the Norwegian Ferro Alloy Industry* at 165, *reprinted in* Def.'s App. Attach. 3 at 2; Pls.' App. Tab 10 at 26). Although plaintiffs argue "[t]he statement in the article that energy is 'preserved' in the produced alloy merely refers to the change in the energy balance that accompanies all chemical reactions," (Pls.' Comm. at 16n.58), Commerce also pointed out a silicon expert at the United States Department of Energy's Laboratory in Golden, Colorado confirmed the terms "physically incorporated" and "preserved" could be used interchangeably in this context. *See Department of Energy Memo of July 27, 1995 (reprinted in* Def.'s App. Attach. 2 at 1).[19] Commerce concluded, therefore, "as indicated by one of petitioners' own companies, energy is physically incorporated into silicon metal." *Remand Determination* at 9.

In the *Remand Determination*, Commerce concluded, "[b]ased on an analysis of the information Andina placed on the record and on our verification of that information * * * part of the internal energy measured in the silicon metal is derived from the electrical energy Andina uses in its production of silicon metal." *Remand Determination* at 5. Commerce explains

> [t]his conclusion was further confirmed after several discussions with a silicon expert from the United States Department of Energy. In addition, a technical article * * *. supports this conclusion * * *. Finally, at verification we also reviewed information explaining how the reaction can be reversed and the energy removed from the silicon metal. * * * We found this information telling because energy would have to exist in the product in order for it to be removed.

Remand Determination at 5 (citation omitted). This Court finds Commerce's conclusion that energy is physically incorporated into silicon metal during the production process is supported by substantial evidence on the record and is otherwise in accordance with law. Commerce correctly followed the instructions contained in this Court's remand order to determine whether any of the components of silicon metal was physically incorporated into the product, and, if so, to determine whether the rebated tax was directly related to the merchandise in question and its physically incorporated components.

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[19] Plaintiffs point out this same expert said he would not characterize energy as a physical property of silicon metal. (Def.'s App. Attach. 2.) Commerce found plaintiffs

> mischaracterized the statements made by the silicon expert consulted by the Department. When asked about the physical incorporation of energy in silicon metal, the expert stated that "as a physicist, working with silicon, he would not characterize energy as a physical property of silicon metal". However, the expert added that chemists producing silicon metal would be concerned with the internal energy of the silicon metal.

Remand Determination at 9 (citation omitted).

C. Taxes for Which Adjustments May be Made:

In addressing the question of whether Commerce correctly calculated the rebate adjustment, plaintiffs argue Commerce disregarded the express language of the statute and the intent of Congress in adjusting USP for the tax rebate Andina received for electricity it purchased and impermissibly "expanded the range of rebated taxes for which an adjustment to USP can be made." (Pls.' Comm. at 18.) Defendant, however, maintains "[t]o the contrary, Commerce has followed the express language of the statute and the intent of Congress by only making an adjustment for that portion of the tax on electrical energy purchased by Andina and rebated under the Reembolso program on exportation, which was shown to be physically incorporated into the exported silicon metal." (Def.'s Resp. at 18.)

This Court disagrees with plaintiffs' argument Commerce incorrectly applied the law by adjusting USP for taxes imposed on Andina's purchase of electricity. Rather, the Court finds Commerce's conclusion

> since Andina pays taxes on electrical energy, and electrical energy is a necessary input in Andina's production of silicon metal, and the electrical energy is measurable in the silicon metal, we have correctly applied the law by adjusting USP for taxes imposed on Andina's purchase of electrical energy

Remand Determination at 10, to be supported by substantial evidence on the record and otherwise in accordance with law. After Commerce determined electrical energy was physically incorporated into silicon metal, Commerce calculated the portion of energy attributable to electrical energy purchased by Andina by verifying the calculations Andina provided establishing (1) the amount of internal energy in silicon metal, (2) the total amount of energy used in, and generated by, the chemcial reaction, (3) the amount of heat loss in the production process, and (4) the breakdown of total energy between chemical energy, in-plant generated energy, and purchased energy. *Remand Determination* at 5–6. Commerce then calculated the percentage purchased energy represented of the total energy physically incorporated in silicon metal, and allowed a tax rebate adjustment for that amount. *See Remand Determination* at 6. Commerce also explains Andina's energy supplier provided it with invoices listing the amount of energy purchased by Andina and the relevant amount paid in energy taxes. Remand Results at 10. This Court finds Commerce's adjustments to USP accounting for a portion of the taxes imposed on purchased electricity are supported by substantial evidence on the record and are otherwise in accordance with law.

D. *Past Departmental Practice:*

Plaintiffs also argue Commerce's treatment of energy in this case is "contrary * * * to consistent Department precedent," (Pls.' Comm. at 7), because "the Department has never found any form of energy to be physically incorporated into a final product." *(Id.* at 12.) In support of this argument, plaintiffs cite previous determinations in which Com-

merce did not classify electricity or energy as a physically incorporated input or found energy or electricity was not physically incorporated into the final product. *See* Pls.' Comm. at 8–10 (citing *Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 49 Fed. Reg.18,006, 18,009–10 (Dep't Comm. 1984) (finding fuel and electricity are not physically incorporated into final product); *Amoxicillin Trihydrate and Its Salts From Spain; Final Results of Administrative Review of Countervailing Duty Order*, 47 Fed. Reg. 33,999, 33,400 (Dep't Comm. 1982) (in countervailing duty investigation involving amoxicillin trihydrate, Commerce discussed difficulties in identifying physically incorporated inputs, stating "[e]nergy can in no way be considered physically incorporated in the final product"); *Final Affirmative Countervailing Duty Determination; Potassium Permanganate From Spain*, 47 Fed. Reg. 29,300, 29,302 (Dep't Comm. 1982) (in countervailing duty investigation involving potassium permanganate from Spain, electricity used in an electrolytic process was "not physically incorporated into final product"); *Ferroalloys From Spain; Final Countervailing Duty Determination*, 45 Fed. Reg. 25 (Dep't Comm. 1980) (in proceeding involving ferroalloy products manufactured using same smelting process as silicon metal, electricity was not classified as a physical input used in the production process). Plaintiff likens this case to the ones cited above and concludes electricity is not a physically incorporated input but "is used to perform the same function as a fuel—to generate heat." (Pls.' Comm. at 10.) Plaintiffs add "energy is not a physical substance and is not a physical component of final products." (*Id.* at 12.)

In addition to the above precedent, plaintiffs also cite Annex I to the Department's countervailing duty regulations which includes an explanation of the "physical incorporation test," and, according to plaintiffs, recognize energy is not a physically incorporated input. The regulation states:

> ANNEX I—ADMINISTRATIVE AND INTERPRETIVE GUIDELINES FOR DETERMINATION AND CALCULATION OF SUBSIDIES
>
> 1. The physical incorporation test: * * * Under that test, the rebate or remission of fiscal charges on items physically incorporated in the exported product is not considered a subsidy. Rebated taxes on services, catalysts and other items *(e.g. energy)* not incorporated in the product * * * would be treated as * * * a subsidy.

19 C.F.R. § 355, Annex I (1988) (emphasis added).[20]

Defendant, however, argues plaintiffs

> cannot rely on Commerce's previous determinations as if they constitute an irrebuttable presumption that electricity or energy could never be found to be physically incorporated into a product. * * *

[20] Plaintiffs explain in 1988 the Department deleted Annex I due to concerns regarding the inclusion of statements of agency practice in the regulation and not due to a change in Department policy regarding the physical incorporation test. (Pls.' Comm. at 11n.42.)

> [P]rior Commerce determinations concerning the non-physical incorporation of electricity or energy do not preclude Commerce from determining in a subsequent proceeding that electrical energy is physically incorporated into an exported product if there is substantial evidence on the record supporting such a finding, as there is in the instant proceeding.

(Def.'s Resp. at 13–14.) Defendant also argues the passage of the Annex I cited by plaintiffs "does not indicate that 'other items,' such as energy, could never be found to be incorporated into the final product." (Def.'s Resp. at 14n.6.)

Commerce acknowledges "there is case precedent involving other products where the Department has determined that the energy has not met the physical incorporation standard." *Remand Determination* at 4. Commerce, however, maintains past practice "does not mean there is an irrebuttable presumption that electricity or energy could never be found to be physically incorporated if record evidence were to support such a finding," *Remand Determination* at 11–12, because case law has established "'[p]hysical incorporation is a question of fact to be determined for each product in each case.'" *Remand Determination* at 12 (quoting *Ferroalloys from Spain; Preliminary Results of Administrative Review of Countervailing Duty Order*, 48 Fed. Reg.4,019, 4,020 (Dep't Comm. 1983); *Oleoresins of Paprika From Spain; Preliminary Results of Administrative Review of Countervailing Duty Order*, 46 Fed. Reg. 61,684, 61,684–85 (Dep't Comm. 1981).

Commerce points to other instances where it has determined raw materials and inputs were physically incorporated into the final product. *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Oil Country Tubular Goods From Argentina*, 49 Fed. Reg. 46,464, 46,466 (Dep't Comm. 1984) (finding portion of natural gas used in reduction of iron and other inputs claimed under transformation cost category met physical incorporation test after verification demonstrated physical incorporation); *Final Results of Administrative Review of Countervailing Duty Order; Oleoresins of Paprika From Spain*, 47 Fed. Reg. 11,916, 11,917 (Dep't Comm. 1982) (finding portion of solvent which accompanies oleoresins throughout the entire production process to be physically incorporated when foreign producers submitted evidence allowing Commerce to quantify the portion). Additionally, in *Unwrought Zinc From Spain; Final Results of Administrative Review [and] Countervailing Duty Order*, 48 Fed. Reg. 35,689, 35,690 (Dep't Comm. 1983), respondents asked Commerce to take account of a rebate of indirect taxes on electricity used in transferring electrons to form zinc because that portion of electricity is physically incorporated into the manufacturing process. Although Commerce did not allow a rebate, it noted "the exporters were unable to provide evidence itemizing that portion of electricity serving as necessary waste in incorporating electrons to form zinc." *Id.*

The implication of these prior determinations, Commerce argues, "is that if evidence were presented to demonstrate that an input which typi-

cally is not considered to be physically incorporated is shown to be so, and can be quantified, then the Department would not reject that evidence out of hand." *Remand Determination* at 13. In this case, Commerce concludes Andina placed evidence on the record demonstrating a portion of the electrnal product, and Commerce was able to quantify the amount of the physically incorporated energy on which to base the allowed tax adjustment. *Id.* This Court finds the evidence Andina placed on the record, as well as Commerce's subsequent verification of that evidence, which included consulting an independent expert on silicon from the Department of Energy who corroborated Andina's position and a technical article co-authored by one of the plaintiffs concluding "energy is 'preserved' in silicon metal", *Remand Determination* at 13, indicates Commerce properly determined energy is preserved in silicon metal after the production process is complete. Commerce's conclusion "[t]hus, notwithstanding the Department's previous determinations with respect to the non-physical incorporation of electricity or energy, there is sufficient evidence on the record in this proceeding demonstrating that a portion of the electrical energy used in the production of silicon metal is, in fact, physically incorporated into the final product," *Remand Determination* at 13, is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

This Court finds the *Remand Determination's* conclusions (1) finding energy is physically incorporated into silicon metal during the production process, (2) adjusting USP for the portion of taxes imposed on energy, and (3) concluding past departmental practice does not preclude Commerce from finding the physical incorporation standard was met in this case, are supported by substantial evidence on the record and are otherwise in accordance with law. Accordingly, plaintiffs' challenges are rejected and Commerce's *Remand Determination* is sustained.

(Slip Op. 97–38)

NEC ELECTRONICS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–04–00201

[Judgment entered for defendant.]

(Dated March 28, 1997)

Horton, Whiteley & Cooper (Robert Scott Whiteley, Craig A. Mitchell), for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert);* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Chi S. Choy),* of Counsel, for defendant.

OPINION

GOLDBERG, *Judge:* This matter is before the Court following trial *de novo*. This case involves the proper tariff classification of laser diodes and laser diode modules. The United States Customs Service ("Customs") initially classified the merchandise under various tariff classifications upon entry into the United States in 1991. However, in response to NEC Electronics, Incorporated's ("NEC") complaint filed with this Court, Customs stated that it intends to classify and reliquidate all of the merchandise as "light-emitting diodes (LED's)" under subheading 8541.40.20 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1991), dutiable at the rate of 2 percent *ad valorem*. NEC challenges Customs' intended tariff classification. It argues that the merchandise is properly classified as "other diodes" under subheading 8541.40.60, HTSUS, and, therefore, should enter the United States duty free.

The proper classification of laser diodes and laser diode modules turns on the scope of the tariff term "light-emitting diodes (LED's)" as intended by Congress. To ascertain congressional intent, the Court must choose between two different canons of construction used to interpret the HTSUS: common commercial usage and the Explanatory Notes.

NEC contends that Congress intended the tariff classification "light-emitting diodes (LED's)" to identify a product commonly known in the marketplace as an "LED," and not the laser diode product at issue in this case. In contrast, Customs argues that Congress intended "light-emitting diodes (LED's)" to have a broader meaning, as demonstrated by the Explanatory Notes, which includes the subject merchandise within its scope. The Court rules in favor of Customs. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

STANDARD OF REVIEW

Customs' final liquidation classification of the merchandise enjoys a presumption of correctness which the plaintiff must overcome in order to prevail on the merits. 28 U.S.C. § 2639(a)(1) (1988). The presumption

pertains not only to Customs' final classification, but also to every subsidiary fact necessary to support its determination. *United States v. New York Merchandise Co., Inc.*, 58 CCPA 53, 58, 435 F.2d 1315, 1318 (1970); *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. 11, 15, 468 F. Supp. 1318, 1320, *aff'd*, 67 CCPA 32, 612 F.2d 1283 (1979).

To determine whether the plaintiff has overcome the presumption, the Court considers whether Customs' classification is correct, both independently and in comparison with the importer's proposed alternative. *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984).

DISCUSSION

The Court will proceed as follows. First, it describes the technology relevant to the products at issue in this case as background. Second, the Court discusses whether the common commercial usage or the Explanatory Notes control the classification in this case. At this point, the Court considers the arguments of both NEC and Customs pertaining to the appropriate classification of the merchandise. Finding that the Explanatory Notes control, the Court then reviews the evidence presented at trial and finds that the subject merchandise is properly classified under subheading 8541.40.20, HTSUS, as "light-emitting diodes (LED's)."

I. BACKGROUND

Two types of products are relevant to this case: light-emitting diodes, commonly known as "LEDs" in the marketplace, and laser diodes. According to Customs' witnesses Dr. Kurt J. Linden,[1] and Dr. James S. Harris,[2] and NEC's witness Dr. H. Craig Casey, Jr.,[3] LEDs and laser diodes are based on the same basic technology. The two products differ in complexity.

In an LED, an electrical current is passed through a p-n junction to produce photons which provide visible light. In order to form a p-n junction, it is necessary to place a compound with an excess of electrons side-by-side with a compound that has a deficiency of electrons to form a single crystal.[4] A p-n junction spontaneously emits photons when an electrical current is passed through the junction, causing electrons from the n side of the junction to recombine with positively charged particles, known as "holes," from the p side of the junction. The photons emitted from this process produce the infrared and visible light of the LED.

LEDs are typically used as small lamps to indicate whether a device, such as a computer, is on or off. According to Dr. Casey, the average cost to retailers of LEDs is approximately ten cents per unit. More advanced LEDs may cost as much as fifteen dollars.

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[1] Manager of Laser Product Development at Spire Corporation.

[2] Professor of Electrical Engineering at Stanford University.

[3] Chairman of the Department of Electrical Engineering at Duke University.

[4] The p-n junction may be made of various base substances, such as silicon. Other substances are added to the base substance in order to add or draw off electrons from the mixture. For instance, adding arsenic, which contains five electrons, to silicon, which contains four electrons, creates a mixture that has an excess of electrons. Adding boron, which contains three electrons, produces a silicon-boron compound that has fewer electrons than the original silicon.

In contrast, although a laser diode contains the same p-n junction as an LED, it requires additional components in order to stimulate the emission of photons, to strengthen the intensity of the photon emission, and to guide the photons into a more focused or coherent emission. In general, a laser requires a feedback mechanism comprised of a set of mirrors set in a cavity that redirects photons emitted from the p-n junction back into the junction. A laser also contains a lens that focuses the photons.

Laser diodes are intended for a variety of commercial applications, including fiber optic transmission systems, optical measurement equipment, optical data communications, and bar code readers and pointers. According to Dr. Casey, they range in cost from five dollars, for simple laser diodes of the type used in CD players, to thousands of dollars, for more powerful lasers used in such applications as fiber optic communications systems.

II. Whether Common Commercial Usage or the Explanatory Notes Control the Classification of the Subject Merchandise

In order to determine which of the two tariff classifications, "light-emitting diodes (LED's)" or "other diodes," more accurately describes the subject merchandise, the Court must determine whether the common commercial usage or the Explanatory Notes control the meaning of the tariff term in the present action.

The general rule is that the Court, in ascertaining the plain meaning of a particular statutory term, presumes that Congress frames tariff acts using the language of commerce. *Nylos Trading Co. v. United States*, 37 CCPA 71, 73 (1949). The commercial meaning of a tariff term coincides with its common meaning, in the absence of evidence to the contrary. *United States v. C.J. Tower & Sons*, 48 CCPA 87, 89 (1961).

Accordingly, NEC presented evidence at trial that the commercial and scientific communities understand the term "LED," which appears in the tariff term "light-emitting diodes (LED's)," to refer to a different product than the subject merchandise. Therefore, according to NEC, Customs improperly classified the subject merchandise as "light-emitting diodes (LED's)" under 8541.40.20, HTSUS.

NEC's evidence comprised testimony from Mr. Udayan Parikh, Product Marketing Manager for NEC, who testified that the term LED is understood by NEC and its customers to mean the simple p-n junction device used as an indicator lamp, rather than the more complex merchandise at issue in this case.

NEC demonstrated that the scientific community also does not identify the subject merchandise as an LED, but rather as a laser diode. Dr. Casey testified that the scientific community distinguishes the two types of products based upon whether the stream of photons that they produce is (1) generated spontaneously or by stimulation, and (2) coherent or noncoherent. According to Dr. Casey, the subject merchandise differs from the product commonly known as an LED because the LED produces photons spontaneously and in a noncoherent stream. In con-

trast, the subject merchandise produces a more uniform or "coherent" stream of photons by a stimulated emission process. According to Dr. Casey, the subject merchandise, therefore, is not known as an LED in the scientific community.

NEC further supported Dr. Casey's testimony by citing definitions from lexicographic and scientific authorities that this Court may rely upon in order to arrive at its decision. *Brookside Veneers, Ltd. v. United States*, 6 Fed. Cir. (T) 121, 125, 847 F.2d 786, 789, *cert. denied*, 488 U.S. 943 (1988). *See, e.g., McGraw-Hill Dictionary of Scientific and Technical Terms* 113 (5th ed. 1994) (defining light-emitting device as a semiconductor diode that converts electric energy efficiently into *spontaneous* and *non-coherent* electromagnetic radiation at visible and near-infrared wavelengths by electroluminescence at a forward-biased p-n junction); *McGraw-Hill Dictionary of Scientific and Technical Terms* 1790 (5th ed. 1994) (defining a laser as a semiconductor optoelectronic device that emits *coherent* radiant energy through *stimulated* emission resulting from the recombination of electrons and holes).

The Court views the evidence presented by NEC to be credible.

However, in the present case, Customs has presented persuasive evidence that Congress intended the term "light-emitting diodes (LED's)" to have a meaning broader in scope than its commercial usage. Therefore, the Court cannot assume that the legal definition of the statutory term "light-emitting diodes (LED's)" coincides with its common commercial meaning. *C.J. Tower & Sons*, 48 CCPA at 89.

Customs' classification is based on Explanatory Note 85.41(C). Explanatory Notes, while not controlling, may be used to clarify the HTSUS. *Mita Copystar America v. Unites States*, ____ Fed. Cir. (T) ____, 21 F.3d 1079, 1082 (1994).

Explanatory Note 85.41(C) sets forth and describes two types of light-emitting diodes: (1) light-emitting diodes, and (2) laser diodes. Explanatory Note 85.41(C) reads as follows:

> (C) LIGHT EMITTING DIODES
>
> Light emitting diodes, or electroluminescent diodes, (based, *inter alia*, on gallium arsenide or gallium phosphide) are devices which convert electric energy into visible, infra-red or ultra-violet rays. They are used, e.g., for displaying or transmitting data in control systems.
>
> Laser diodes emit a coherent light beam and are used, e.g., in detecting nuclear particles, in altimetering or in telemetering equipment, in communication systems using fibre optics.

The Court agrees with Customs that the Explanatory Note unambiguously refers to the laser diode and laser diode module merchandise at issue in this case. According to the Explanatory Note, "laser diodes" emit a coherent light beam. This description, therefore, contains at least one of the two critical elements of a laser diode as defined by NEC witness Dr. Casey, namely, a coherent light beam. The Explanatory Note also identifies one of the leading uses of this technology, fiber optic com-

munication systems. Lastly, the Explanatory Note identifies the laser diode product by name.

It is also clear, based on a plain reading of Explanatory Note 85.41(C), that both laser diodes and the product typically known as LEDs are included within the scope of the tariff classification "light-emitting diodes (LED's)." The Explanatory Note lists and defines both products, "laser diodes" and "light-emitting diodes," under a single general subheading entitled "light-emitting diodes (LED's)." The juxtaposition of the definitions demonstrates that the statutory term "light-emitting diodes (LED's)" was intended to cover both products.

Moreover, the failure of the Explanatory Note to explicitly exclude laser diodes from the general subheading "light-emitting diodes (LED's)" further supports the conclusion that the tariff classification covers both LEDs and laser diodes. In cases in which the Explanatory Notes clearly intend that a closely related item is not to be classified under a particular tariff term, the Explanatory Notes state the exclusion. *See, e.g.*, Explanatory Note 85.41(D), (excluding unmounted piezo-electric crystals from the category mounted piezo-electric crystals).

Customs further supports its position by pointing out that the p-n junction technology underlying both LEDs and laser diodes is closely related. According to Customs, this suggests that Congress intended both products to be classified together as "light-emitting diodes (LED's)" in accordance with Explanatory Note 85.41(C). Moreover, it shows that NEC's proposed subheading "other diodes" is an incorrect classification. The classification "other diodes" covers products based on technology unrelated to the p-n technology used in both laser diodes and LEDs. 8541.40.60, HTSUS. Therefore, according to Customs, the HTSUS term "other diodes" does not accurately describe the subject merchandise.

General Rule of Interpretation 3(a), HTSUS, instructs the Court to select the classification that is most descriptive of the merchandise rather than the more general description.

Based upon the testimony at trial and upon the Explanatory Notes, the Court finds that the subheading "light-emitting diodes (LED's)" is more descriptive of the laser diode merchandise than is NEC's proposed subheading "other diodes." In particular, the Court bases it decision on the following evidence: (1) Explanatory Note 85.41(C), HTSUS, unambiguously refers to laser diodes and places them under the tariff term "light-emitting diodes (LED's);" (2) Customs' classification of the subject merchandise as "light-emitting diodes (LED's)" appears to cover all products that utilize p-n junction technology; and (3) NEC's proposed classification "other diodes" appears to cover technology unrelated to the kind of technology at issue in the present case.

The Court makes a similar finding with respect to laser diode modules. According to General Rule of Interpretation 3(b), goods comprised of different components must be classified as though they were wholly made of the material or component which gives them their essential character. Because the Court finds that the laser diode component gives

the laser diode module its essential character, the Court's finding with respect to laser diodes controls the classification of laser diode modules.

CONCLUSION

The Court holds that the laser diodes and laser diode modules at issue are properly classified under subheading 8541.40.20, HTSUS for "light-emitting diodes (LED's)." Judgment will be entered accordingly.

(Slip Op. 97–39)

GRUEN INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–05–00629

[The Court dismisses plaintiff's claim due to the failure to file a timely protest.]

(Dated March 28, 1997)

Sosnov & Associates, (Steven R. Sosnov) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis)*; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mark K. Nachman)*, of Counsel, for defendant.

MEMORANDUM OPINION AND ORDER

GOLDBERG, *Judge:* This matter comes before the Court on cross-motions for summary judgment. Plaintiff, Gruen Industries, Inc. ("Gruen"), moves for summary judgment to compel the United States Customs Service ("Customs") to make available copies of entry papers related to the importation of quartz analog watches liquidated in 1986 and 1987. Gruen seeks to establish this Court's jurisdiction under 28 U.S.C. § 1581(a) (1994). Customs opposes Gruen's motion on the grounds that the action is barred under 28 U.S.C. § 2636(a) (1994), because Gruen failed to satisfy a precondition to invoking this Court's jurisdiction, namely, the timely filing of an administrative protest.

The sole issue in this case pertains to the appropriate date on which the administrative process ended under 19 U.S.C. § 1514(c)(3) (1994). This is the date that triggers the one hundred eighty day statute of limitations under 28 U.S.C. § 2636(a) for filing an action with this Court.

Customs contends that the appropriate date occurred in January 1988 and, therefore, this Court lacks jurisdiction to hear plaintiff's claim under 28 U.S.C. § 1581(a). Gruen claims that the appropriate date is November 1, 1994, the point when Gruen maintains that it exhausted its administrative remedies. The Court agrees with Customs, finding that the untimely pursuit of administrative remedies cannot extend the commencement date for the statute of limitations.

Gruen filed this action in order to challenge Customs' refusal to make entry papers available for liquidations that occurred between May 1986 and October 1987. According to an affidavit signed by Gruen's representative, Mr. Lau, Gruen orally requested examination of the entry papers within ninety days of the dates of liquidation. According to the affidavit, Customs officers, at the time of the requests, consistently orally denied access to the entry papers based on New York Region Informational Pipeline No. 1167, Treas. Dep't, U.S. Cust. Srvc. (Dec. 11, 1985). The policy set forth in the Pipeline is that the New York Region will deny an importer access to entry papers for entries that do not involve a change of liquidation, unless the importer submits a written request providing compelling reasons justifying an exception. Under the policy, an importer is expected to maintain its own records and therefore, should have complete records for entries that do not involve a change of liquidation.

On October 23, 1992, more than four years after the initial denials in 1986 and 1987, Gruen requested copies of the entry papers by a letter addressed to the New York District Director of Customs. On September 3, 1993, Customs denied the request by letter. Subsequently, on November 17, 1993, Gruen filed a protest with Customs seeking review of the District Director's refusal. Customs denied the protest on November 1, 1994, on the grounds that the protest was filed late and that the challenged ruling was correct. Thereafter, Gruen filed this action within one hundred eighty days after November 1, 1994.

Pursuant to 28 U.S.C. § 2636(a), a civil action filed with the Court of International Trade under 28 U.S.C. § 1581(a) is barred unless commenced within one hundred eighty days after the date of the mailing of the notice of the denial.

Gruen contends that the one hundred eighty day statute of limitations began to run from November 1, 1994, the date on which Customs denied Gruen's written request for review of the decision made by the New York District Director of Customs. Gruen contends that the denial of the request ended the administrative process and was, therefore, the event contemplated in 28 U.S.C. § 2636(a).

The Court rejects Gruen's argument. As noted above, Gruen waited more than four years before it began to pursue its administrative remedies in October 1992. Customs found that Gruen's initiation of the administrative process was untimely in its November 1994 denial.

The untimely pursuit of administrative remedies by an importer cannot extend the time limit for filing an action at the Court of International Trade. *Transmarine Navigation Corp. v. United States*, 7 CIT 42 (1984). If the Court accepted Gruen's position, this would allow parties to gain access to the courts, after a long delay on their part, by simply writing a letter to Customs and having the request denied for being untimely.

Rather, construing the facts in a light most favorable to Gruen, the Court finds that the administrative process ended sometime in 1988 when Gruen failed to file a protest with Customs. The one hundred

eighty day period of 28 U.S.C. § 2636(a) began with the later of two events: (1) when Customs initially denied Gruen copies of the entry papers; or (2) when Gruen waived its rights to administrative remedies by failing to file a timely protest with Customs.

It is undisputed that all of the entries were liquidated prior to October 31, 1987. Following notice of liquidation, Gruen had ninety days to request examination of the relevant entry papers and to file a protest. 19 U.S.C. § 1514(c)(3). According to Mr. Lau's declaration, he did request examination of the entry papers on behalf of Gruen within ninety days of liquidation. Therefore, per Mr. Lau's declaratired prior to January 31, 1988. Thus, under either scenario, the one hundred eighty day time bar became effective in 1988.

For these reasons, it is hereby

ORDERED that this case is dismissed for lack of jurisdiction.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/47 3/24/97 Goldberg, J.	Westfalia Mining Progress, Inc.	93–12–00827, 92–12–00812	8479.89.90 3.7%	8430.50.50 2.5%	Agreed statement of facts	Baltimore Self-propelled hydraulic shield supports for use in underground coal mining machines
C97/48 3/25/97 Wallach, J.	Construction Fasteners, Inc.	95–08–01053	7318.12.00 12.5%	7318.14.10 6.2%	Agreed statement of facts	Philadelphia 9 gauge metal screws of various lengths
C97/49 3/25/97 Wallach, J.	Construction Fasteners, Inc.	95–12–01596	7318.12.00 12.5%	7318.14.10 6.2%	Agreed statement of facts	Philadelphia 9 gauge metal screws of various lengths
C97/50 3/25/97 Wallach, J.	Construction Fasteners, Inc.	95–12–01597	7318.12.00 12.5%	7318.14.10 6.2%	Agreed statement of facts	Philadelphia 9 gauge metal screws
C97/51 3/25/97 Wallach, J.	Construction Fasteners, Inc.	96–05–01306	7318.12.00 12.5%	7318.14.10 6.2%	Agreed statement of facts	Philadelphia 9 gauge metal screws of various lengths

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V97/2 3/26/97 Goldberg, J.	Tomato, Inc.	87–03–00508	Invoiced prices, which included non-dutiable quota charges	Invoiced prices less the quota charges	Agreed statement of facts	Los Angeles Men's and boy's knit shirts

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